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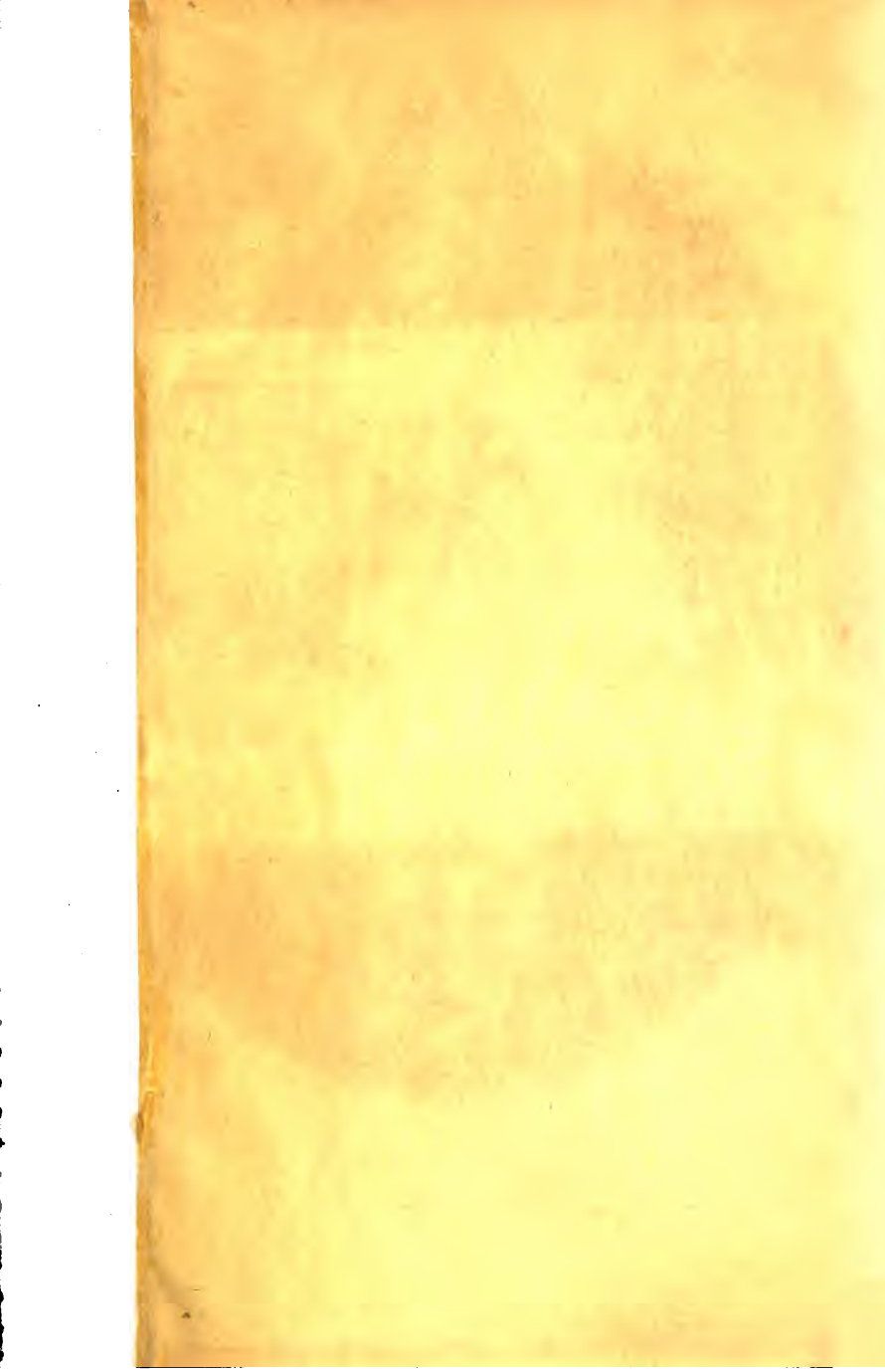
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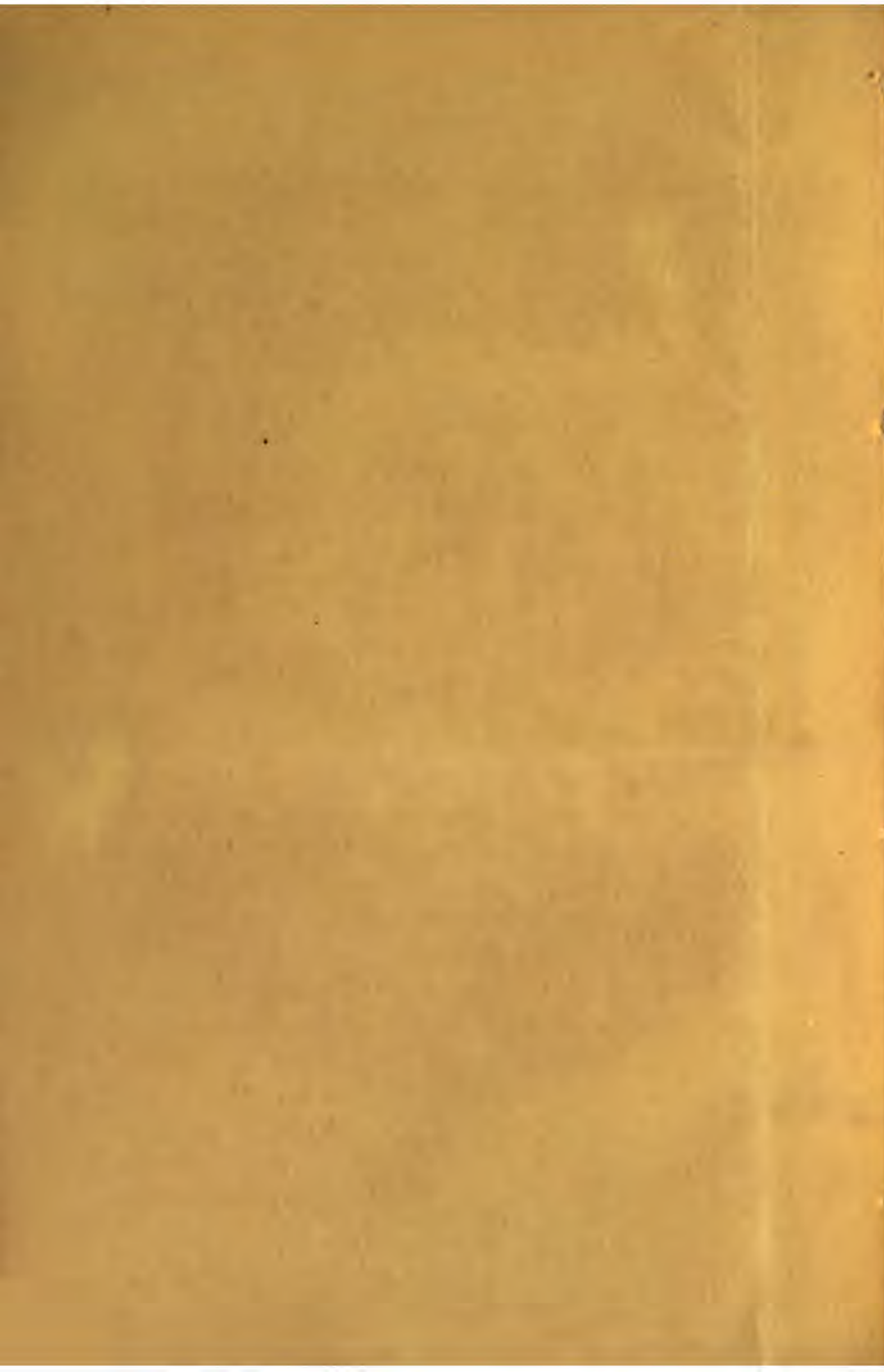
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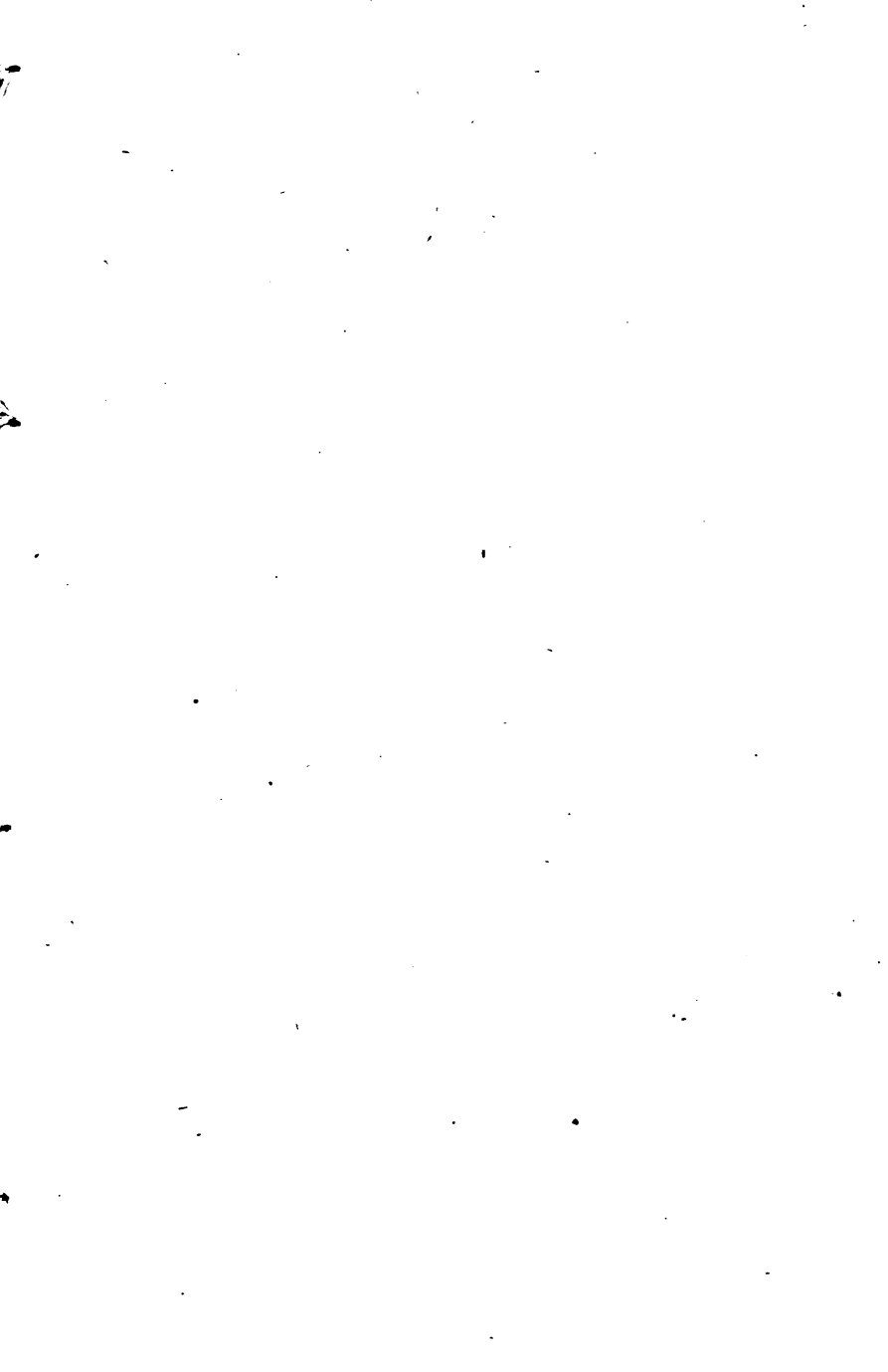
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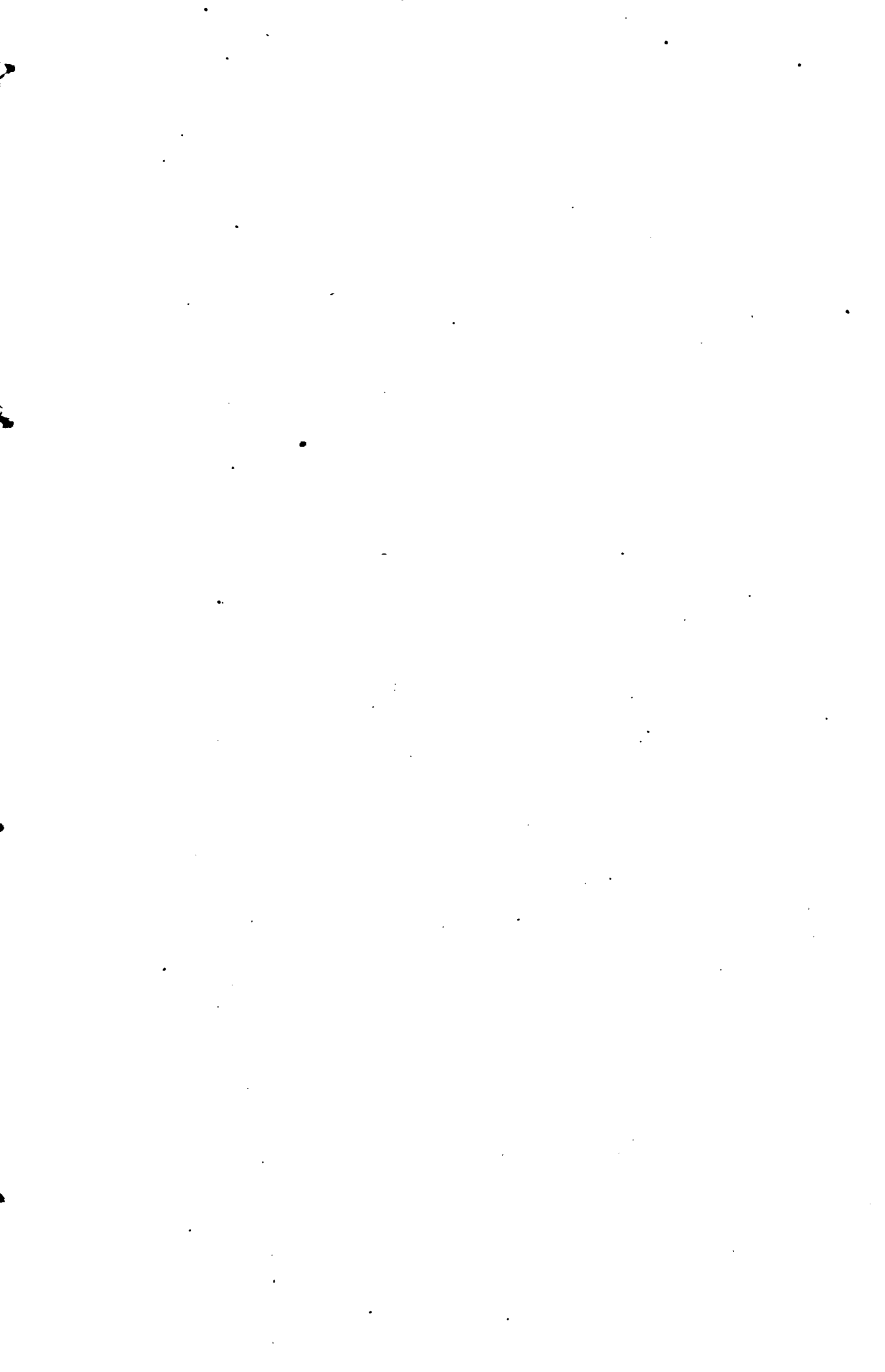
1873.

















THE
LIBERTIES OF AMERICA.

BY H. W. WARNER,

"

OF NEW YORK.



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It is hard to find a government in the past in which there has been popular government.

P R E F A C E .

THE following treatise is an attempt to popularize in some degree a matter of professional science. And as nobody reads such matters who can well avoid them, it is probable I may have adverse prepossessions to contend with, from the very nature of my enterprise.

There are other embarrassments in the case. My theme is too familiar to the public mind (the public ear and tongue, to say the least) to be easily made attractive, especially for common readers, whose attention I am mainly anxious to secure. Many are like to take for granted that they know enough about it already. My hope is, that a few will regard its practical interest as making up in some degree for its triteness. That interest is certainly considerable. A great experiment is on foot : nor can the final issue be as yet very confidently predicted. Popular government has never permanently succeeded in any country ;

and whether its triumph in our own is to be lasting, may for aught we know depend, under God, as well upon the freemanly intelligence of the common people, as upon the purity and solidity of their principles.

The question will then be, as to this freemanly intelligence, what it is ; and when a citizen may be fairly said to have made all requisite attainments in the knowledge of his liberties.

I am afraid it will turn out that the wisest of us are no wiser than we should be in the matter. Judging from my own observation, the number seems to me not great, of whose acquaintance with the subject wisdom can be at all predicated. And I venture the opinion that if twenty persons, taken without selection from the multitude, were to be severally inquired of for a brief statement of their creeds as freemen, the more intelligent half of them would appear by their answers to be of quite different faiths, at least in some points ; while the answers of the rest might be more uniform perhaps, but only from the circumstance of their really amounting to nothing, and being, from first to last, inept and childish. The truth is, men do not always understand that best which is most familiar to them. An object may be too constantly before us to excite investigation. It may be too near the eye to be distinctly seen.

Let us be reasonable. Freedom is not a simple idea. And a full economy of freedom, in a land of laws, is among the most complex of human things. Men of study may find their way through such a subject, but

this is not to be expected of the masses ; at least, not till they are better provided with facilities than at present. Our schools, academies, colleges, do little or nothing for the liberty student. A sad deficiency. And yet I see no help for it under existing circumstances ; for even authorship is wanting. There are not books to instruct from. An occasional paragraph may be found, as to the right of physical locomotion, a mere rudiment of the general theme ; but liberty, in the vast range of its *applied forms*, is left quite out of view, having never yet been treated of distinctly by any writer.

And here, if nowhere else, I trust I have a door of entrance for the reader's thanks. Such a subject ought not surely to lie waste. It should be thoroughly discussed. There ought to be a *literature of freedom*, accessible to everybody, and suited if possible to everybody's wants. To which end, mine is a pioneer effort. I have had no predecessor to instruct me either by success or failure in a similar enterprise. Let me be judged accordingly. I have done as well as I could. And though my handling of the matter discussed should fail to please the public, they will yet allow me the solace of believing that I have done my country some small service by being the first to handle it at all ; since it is better the people should be led, by any guidance, to *think* upon what so nearly concerns them, than to go on talking, as the fashion is, without thinking.

From certain references that are made in the latter

part of the work to French affairs, it is proper to add that my manuscript was completed some two or three years ago, during the *presidency* of Louis Napoleon, and while France was governed as a republic. Without this information, those references would be scarcely intelligible.

H. W. W.

New York, April, 1853.

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LIBERTIES OF AMERICA.

CHAPTER I.

DEFINITION.

THE term liberty, though too plain almost for definition, has been variously understood. The metaphysician, the theologian, the jurist (not to mention others) have had each their several uses for it in very different meanings. To one man it is a self-determining power of mind, a quality of volition; to another, it is a power of adapting one's efforts to the dictates of his will when determined, a quality of physical action; to a third, it is an outward freedom of conduct in regard to men and things, a quality of general enterprise, or rational pursuit in choosing what to do, and when, and where, and how to set about it in the actual circumstances of life, and employing the faculties of soul and body for effecting the design. This last is probably the original, and certainly the common sense of the word; if I mistake not, the only practical one; the others being rather speculative, or things of closet philosophy.

No man is conscious, I believe, either of liberty or the want of it, in anything that precedes or accompanies volition in the way of self-determining influence. The only influence

we are aware of as conducive to the decisions of the will, is what is called *motive*; a perceived good to be sought after, or evil to be shunned. When the intellect notes the presence of a sufficient *motive*, or forms one out of its own conceptions, the will is necessarily determined by such motive. Will and intellect are faculties of one spiritual agent, working together in a perfect though inscrutable harmony of co-operation. We can discriminate their acts as of different faculties, but the personality of the agent being single, liberty is scarcely the name for a mere concurrence of its powers.

Again, the will being once determined, a third faculty develops itself in a movement of the physical energies. As volition follows motive, so action waits upon volition; why, or how, we know not, having not the slightest consciousness of the philosophical nature of the process. When therefore we call it a free process, we speak in the dark, and utter we know not what; unless, indeed, the mere absence of any felt entanglement or obstruction be freedom, which it certainly is not, in any but a vulgar and inaccurate use of the term; for as in acts of intellect and will, so when bodily exertion takes place, the agent is still single, still one and indivisible; and to ascribe the quality of freedom to one or more of the particular powers exerted, because acting consentaneously with the rest, were like calling the mouth or throat free in reference to the hands, for that those eat and swallow the food which these administer.

Strictly speaking, liberty is an attribute of *the whole mind and person*; of man with all his faculties combined.

Not only so, but of man with all his imperfections too; the entire compound, such as God made him.

And this in his permanent constitutional relations to the world around him; especially the relation by which his weak-

ness is continually manifested, and which shows him ever encompassed with difficulties, many things out of his reach entirely, and nothing absolutely easy to him; and the relation also by which he is at all times, and under all possible phases of existence, a subject of moral government, looking anxiously for the guidance of a wisdom which he cannot help thinking must reign somewhere far above the province of his own, and fearing instinctively the displeasure of a power no less exalted.

In short, to form a true estimate of the liberty of a human being, either generally or in any particular state of society, as compared with others, two things must be carefully attended to: first, *his nature*, as a subject of that liberty, the stock it grows upon; and next, *the essentials of his earthly condition*; for in this, no less than in himself, while some things are accidental and may change from time to time, some are fixed and invariable.

The prevailing notions on the subject have been formed by an easier method. It has been usual to look, not at man the individual, a being to whom the tests of experience and observation can be applied, but at society in its supposed origin, or numbers of men grouped fancifully together in a *state of nature* so called; a topic which neither observation, nor experience, nor history, nor even tradition, throws the smallest light upon, and of which, therefore, we can only speak in blind and wondering conjecture. The liberty of this dreamed-of state is set down at a venture for the largest that can be conceived—a total absence of restraint; the very perfection of doing as one pleases.* And it is even referred to as the general fountain-head whence everything else that bears the name of liberty

* "To do *what we will* is natural liberty."—PALFREY.

"The absolute and uncontrolled power of doing as one pleases."—BLACKSTONE.

is derived. The liberty of freemen in a state of legal order is neither more nor less, we are told,* than natural liberty, so far curtailed and modified as the ends of civil and political organization require; that is to say, curtailed by a portion of this primary stock being given up to constitute a mass of political authority for government purposes; and modified, by the use made of that ceded portion in the establishment of a detailed civil economy for the control of individuals in their conduct towards each other. In which view of things law and government are assumed to be mere restraints upon liberty; hindering the citizen from doing as he pleases, and as in a state of nature it is said he might do; taking somewhat, in other words, from his original and natural freedom, and adding nothing to it; protection, not liberty, being his compensation for the loss he bears in submitting to them. Such is the fashionable doctrine.

Now there is strong objection to this whole train of ideas.

No liberty that we know anything about consists in the absence of restraining influences, or is necessarily impaired by their presence. Else the fewer laws in any given community, the greater the freedom of individuals; a proposition so far from being true, that the very reverse may in general be affirmed with confidence. There is a mode of speech, indeed, that puts liberty and restraint in opposition to each other; nor can it be denied, that in certain extreme cases of *undue* restraint, which those who treat of the subject have frequent occasion to refer to, the two things are thus opposed. But extreme cases are not the best exponents of general truth. It is only when restraint is either *out of place or out of measure*; wrong, that is, *either in application or degree*, that a man can be said to have his liberty lessened by it. The question turns upon *what is*

* Blackstone and others hold this language.

necessary and proper to the lot of man, as distinguished from evils superinduced upon it by human agency. No man is oppressed by restraints which are not of a nature to overbear any of the *rights* God has given him. If therefore he is *as free as he ought to be*; in other words, enjoys the objects of his rights as fully as those rights entitle him to do, his freedom, as a man of rights, cannot be said to be so much as touched by the restraints he is under, be they what they may; for they are natural qualifications of the very gift of his freedom at God's hands.

We may conceive perhaps of a liberty quite unrestrained and arbitrary, but it is not *human* liberty; it is a pure abstraction; no one ever realized or can realize it, for it comports neither with our frame nor our condition: we are not made for it, nor capable of anything like it. Human liberty lies in the middle ground. It is at best but a qualified power; a power of acting, not independently of restraints, but under and in the midst of them. We are never clear of them entirely, and it is impossible we should be. Whatever visions we may form about the state of natural society, it is certain from what we know of ourselves, that constituted as we are, and related and proportioned as our faculties are to the scene and work appointed for them, our liberty is *essentially and necessarily* mixed up with restraint, with much and various restraint, both physical and moral, in the very doom of the creator.

Moral restraint is plainly universal. God is a moral governor, and his laws, like his goodness, are over all his works. We are born to an irretrievable subjection of mind. There is a feeling in the rudest breast that owns it. Atheism itself—a vice of civilization, by the by, and not of nature—quails secretly to an omniscient, omniregnant Deity, from whose presence there is no escape. The universality of the moral sense proves that

the divine will, known or only guessed at, as the case may be, is everywhere felt to impose duties which few are able to cast off entirely.

Indeed, as rational beings, acting with a view to consequences, we are incapable of a strictly arbitrary freedom. It is impossible for us to be quite reckless in our choice either of ends or measures; and not being reckless, we are involved by our ignorance in continual doubts and difficulties, such as we are often puzzled to get along with. Scarce a point in human conduct but admits of debate. It is the office of reason to preside in the ceaseless argument of life, and give, as far as may be, a just direction to our efforts. Probable results are to be looked at beforehand. The good and the evil they portend are to be weighed against each other. And after all, decide as we may, there are sacrifices to be submitted to. Although the course we happen to take should be a right one, we must yet lose somewhat in most cases by pursuing it; while, if wrong, the loss is possibly further off, but greater. Vice itself is but a triumph of bad motives over good ones; of appetite or passion over self-respect, over conscience, over the dread of future retribution. Nor is the victory easily won. The most hardened reprobate has his misgivings, while the novice in crime struggles long before the opposition of his lurking scruples is so far overcome as to allow him to proceed.

So that natural liberty, be it what it may in other respects, instead of going free of moral restraints, carries them along with it by thousands. These restraints might as well be said to exclude the existence of that liberty, as to be excluded by it. The two things go together. They are parts of one system, and if we are to speak truly or usefully of either, we must take them as they are, in their inseparable connexion. Men are neither angels nor devils, but a combination of both with

earthly materials that belong to neither ; and partaking largely of the earth, they conform to its analogies in the working of their active principles ; their movements being a compound (so to speak) of action and reaction, impulse and resistance ; and the effects produced, instead of expressing results as of absolute power, express only a prevalence of power over the frictionary and retarding influences with which earthly operations are invariably attended.

Nor are the *outward advantages* of savage life (for we can get no nearer to a state of nature than by referring to the case of savages) a whit better than those of its mental and moral condition.

The man of the forest is as weak as others in his own frame, at the same time that the art of relieving and compensating that weakness by mechanical contrivance is quite unknown to him. Shut out from knowledge of every sort, he is a stranger to the might it confers on happier portions of mankind. His physical circumstances are thus the very worst that can be ; and instead of receiving aid from his fellows, he finds in them the severest aggravation of his embarrassments.

The actions of a savage may be classed as either running counter to the interests of his neighbours, or agreeing with those interests. In the former view, they meet of course with a degree of opposition fatal to everything like freedom in the performance of them. Savages do not suffer their interests to be crossed with impunity. And even admitting one's line of conduct to be harmless, and such as ought not to arouse the jealousy of those around him, what security will that give him against their interference ? They are almost sure either to misconceive his aims, or for other and worse reasons to obstruct the execution of them. Everything is consequently uncertain to him ; and liberty, if it exist at all, is only a thing to be

snatched at, not enjoyed. Strength or cunning may win their way for a time; but as these qualities are not common to all men, nor uniformly available to any, the freedom they may help to realize is both too partial in extent, and too precarious altogether, to give character to an historical period or stage of society. It is an exception, not a rule.

In a word, the state of nature, so far as we are able to judge of it, cannot be otherwise thought of than as possessing its full share, to say the least, of the perplexities by which human action is wont to be straitened in the pursuit of its ends. Impediments of all the kinds we are acquainted with would seem to throng upon and distress the liberty of such a state beyond the usual lot; leaving indeed to individuals *no* power of doing as they please, save only to the extent of what each is able by his personal energy and skill to work out for himself, unaided, unprotected, and without the smallest external security for results; a power, not more characteristic of a freeman than of a slave; a man, than a brute; for all alike may take their chance in it.

To attempt, therefore, to deduce the liberties of regulated life from those of untamed nature, as if nature's freedom were the greater, and that of politic society the less; nature's, the luxuriant first growth, out of which the other is formed simply by topping and pruning; is a desperate enterprise. The savage state, say the best you can of it, is a state of free *effort* only, not of enjoyed freedom; a state in which men may be supposed to do *as much as they can* of their pleasure, while in matter of fact they are generally baffled, so as scarce in any case to come by their wishes, even when these are right and proper in themselves.

We want something better. As rational agents, acting prospectively, it is preposterous to say whether we are free or not,

till we have taken into account the degree of success or failure with which our efforts are usually attended. To be truly free, we must have a chance not only of trying but *doing* ; not only of putting our faculties to work, but of *accomplishing* in general the ends we aim at—being reasonable ends, however, and not at variance with the divine constitutions, which of course qualify everything.

Liberty, let it be borne in mind, is not itself a right, but the object of one. A man, for instance, has a right to defend himself from aggression. He has the right, whether he have power to use it or not ; but his liberty lies in the power only, and fails if this be wanting. Suppose him bound hand and foot, where were his liberty then ? And yet the right remains. It is idle to talk of one's being free to do what is plainly impossible in the circumstances. A prisoner is not free to go abroad ; a child, to repel the assault of a man ; a savage, to compass one in a million of the blessings of civilization. The prisoner may *try* to escape ; the child may make an *effort* of resistance ; the savage may *struggle manfully* with the ills that overwhelm him ; but when success is hopeless, the liberty enjoyed is only *tentative* : a liberty of *trying*, not of *doing* ; and if the odds are such, as to show this beforehand, no use will in general be made of it ; men do not attempt hopeless things that are seen to be such. So that whatever puts a matter *obviously* beyond hope, takes away all liberty respecting it. When President Jackson told the southern Indians, that although he would no longer defend them against the bayonets of Georgia, yet they were free to remain in the land of their fathers if they chose to do so, he was guilty, to say the least, of an abuse of terms.

Nor is it impossibilities alone that exceed the scope of human liberty. Things that are wrong, degrading, or even palpably foolish, are in like predicament. For as liberty is an object of

right, it is bounded essentially by the limits of that principle. And since no man has a right to do wrong, that is, to violate his conscience, to injure his neighbour, or to play the knave or fool in any manner; it is plain his liberty lies within the same barriers, and no laws even of human enactment, which do but fortify those barriers, or come in aid of them, can be considered as encroaching upon, or at all touching that liberty. Suppose a natural precipice; is any one free to throw himself adown it? And if government should build a fence along the verge to prevent such a catastrophe, whose freedom would be curtailed? Crimes too, are precipices, and of the worst aspect. Folly itself is one, for it is impossible to be guilty of folly even, without a fall—a fall from the position every man is stationed in by his maker, and which as a rational and responsible being he cannot innocently abandon or dishonour.

We see, therefore, what liberty is *not*. It is not the mere absence of restraint; for natural circumstances and moral law confine it always within certain impassable bounds. Neither does it consist in any power of doing as one pleases; for a man may please to act a fool's or a culprit's part; to rebel against his maker, defraud his fellow man, or prostitute his talents and betray the trust of life by vicious indulgences.

What then is it?

I would say, it is *the power of doing, free of human hindrance, whatsoever God's laws permit.*

First, of "*doing*," as distinguished from *trying to do*. Of course within a given range; for the power is man's, and therefore limited. Something, however, it must be able to *achieve*, or it can never have the name of liberty. Slaves may make efforts, and for themselves; but it is of the essence of their condition that such efforts, and the desires that prompt them, are habitually overborne and frustrated.

Secondly, "*free of human hindrance*;" for other hindrances are providential, and compose a necessary portion of the freeman's lot from the beginning. That he cannot fly; that he may not steal; that the bonds of nature and heaven are upon him; are circumstances of no disparagement, for they put no inequality between him and others of his race; and being true alike of all, they touch the relative freedom of none. Tyranny of every sort is earthborn; and it is only when men are *unduly straitened by their fellows* that their liberty is incomplete.

This straitening may come either by actual violence, or by fear, a violent motive. Fear is itself a great oppressor, and a common helpmeet of all dealers in tyranny. So that we need protection both against forcible injury and the apprehension of it. Muniments, visible muniments are wanted. No man is truly free, whose freedom is not somehow guarantied to him. To enjoy it, to possess it even, security is necessary,—*conscious* security; he must feel his treasure safe; his title to it must be clear and stable; good in his own eyes, and generally acquiesced in by those around him; a quiet title, which he may rest upon, and which, if he should happen to be disturbed in it, he may know infallibly how to vindicate. Thus assured, the citizen can look upon his liberty as a thing of use for important purposes; whereas, so long as there is doubt in the matter, it is consumed, if I may speak so, in taking care of itself. Until the faculties are released from the servitude of watching defensively over the field and process of their own action, and the mind disburdened of the anxieties of personal danger, freedom, so far as the ulterior and more legitimate objects of life are concerned, is quite out of the question.

For in the third place, to be a freeman indeed, one must have the full range of those objects; of all that it is right and

well to do ; all that by doing he can benefit himself or others ; in a word, "*whatsoever God's laws permit.*"

Here are two ideas, a negative and a positive, implied in the proposition.

As man is a responsible being, holding his powers under trust to be rigidly accounted for hereafter, he can never be free to violate the rule of this responsibility. The divine economy must have its course. We are created for definite and known purposes which may not be disregarded. To pretend a natural liberty for any one act of folly or of crime, is a contradiction in terms, for it is but saying that the law of nature warrants the setting its own injunctions aside. We may *desert* the path of duty ; nothing easier or more common ; but to claim a *liberty* for doing so, is to confound liberty with license ; a noble principle, with the essence of villany.

Nor can this be matter of regret or inconvenience, but the contrary. It were as reasonable to complain of the ocean for limiting our walks, as of God's laws for setting bounds to the exertion of our moral energies. We can indeed walk into the ocean if we will, but at the peril of our lives ; and it is alike easy to plunge into the abyss of crime, provided we are ready for the perdition that lies at the bottom. The barriers of nature are partly physical, partly moral ; and as every man of sense turns at the seashore, without imagining the continent too small for his liberty, so it is impossible that a wise subject of God's government should feel his freedom cramped by the bright and beautiful horizon of *duty* that everywhere hems it in. So long as there is no desire to go astray, there is no feeling of restraint from inclosures made to prevent it. In which respect, it must be owned, good men, if not in fact freer

than others, enjoy a smoother and happier consciousness of freedom ; escaping many, perhaps most, of the crosses and vexations incidental to a life of vicious excitement and transgression.

On the other hand, notwithstanding there are limits which we have no self-disposing prerogative to pass, our field of action is still a very large one ; large enough to admit of an almost infinite variety of pursuits and occupations. And it is material to observe, that liberty, considered as a power of effectual effort, is generally greater in proportion as more can be done with it. All stars are not of one magnitude ; all freemen, not alike rich in the true treasure of their freemanly condition. An acorn, in integrity of parts, may be identical with the oak which it is capable of evolving. Yet in their actual state how different. So an infant may be regarded as possessing the attributes of a man, while his ignorance of all the high aims of rational existence, and his utter incompetency to pursue them, leave him as low in the scale of liberty as of mind. What is the freedom of a blind man, compared with one who has eyes ? Of an idiot, compared with a philosopher or statesman ?

It is a law of most things appertaining to humanity, that instead of being created in full development, they come out by degrees. Small and feeble to a wonder in their beginnings, they require time and culture and favourable circumstances to bring them forward to a ripe maturity. Liberty is no exception to this law, and it may consequently be seen in every imaginable stage of evolution. First, there is an embryon state of things, when life is at the least possible remove from death. Some men, some nations, never get beyond that state ; whereas the heights of advancement to which others some-

times make their way, are such as might look celestial to untutored minds. Compare a Hottentot with an educated American. Both may be negatively free; security suffices for that; yet how immense the difference in their ranges of activity; their views; their aims; their choice of ends and means; their tastes, hopes, pleasures; everything that prompts, assists, rewards exertion, or widens and enriches its field.

The American citizen, more than the Hottentot, cannot walk upon the seas; but by the help of naval architecture and of science he can navigate them. If laws were made prohibiting both from crossing the Atlantic *afoot*, the freedom of both would be alike unhurt. But suppose the interdict broad enough to prevent passage *in any form*; how would the case stand then? The Hottentot would still be free as ever, but the American's liberty must suffer sensible diminution: a fact which shows conclusively that his freedom has, in one point at least, outgrown the state of nature. Knowledge and art have given him this advantage; it is an addition to the natural stock.

Again, the savage dines, we may suppose, upon roots, herbs, or raw flesh, and has no option beyond; while the board of the civilized man is covered with a hundred nicely prepared dainties, selected from a much larger and more various store of good things. From which premises we have the same conclusion as before.

Indeed the illustrations are numberless; every one of them showing, ~~that~~ as we pass from point to point in the career of advancing civilization and public order, liberty goes with us hand in hand, acquiring new advantages at each step, beyond all the possible or conceivable attainments of barbarians; insomuch that were the comparative accounts footed up, the

• whole of nature's boasted freedom might be subtracted from the freedoms of civilized life without any perceptible effect upon their sum total.

Instead therefore of our civil and political liberty being a reduced measure of the liberty of what has been so generally referred to as the state of nature, it is the only liberty we can think of that deserves the name. None else has adequate protection to give it practical existence. None else has ever yet so far released men's faculties from the slavery of fear and want as to set them at large in any fair sense of freedom, for the pursuit of the great ends of human destiny in the world. In a completely lawless state of things, a state of unmitigated anarchy, such an emancipation never was and never can be realized. To realize it, government is indispensable. There must be somewhere an accumulation of authority that can denounce and inflict penalties of a magnitude sufficient to repress disturbances by plainly overbalancing the temptations that lead to them. Nothing less will do. Government is of all others the most needful and momentous instance of the division of labour upon earth. The want of it is fatal to everything liberal in the direction of men's thoughts and exertions, and of course to systematic improvement. Where no one is safe, or can even venture abroad, though but in search of food to live on, without arms in his hands, what more than food will ever be looked after, or what habitual aims cherished by him, save the ferocious one of killing either his game or enemies? The parent lays up nothing for his child: generation follows generation without increase of light, wealth, virtue, or happiness: the wilderness remains uncheered with cultivation, and to be the chief of its monsters is the highest ambition its inhabitants can hopefully indulge.

Moreover government, in order to having its due effect upon men's liberty, must be legal, not arbitrary ; a distinction more important far than any of those formal ones so celebrated in the literature of the subject. The will of a human being is the most unstable of all things. It is another name for caprice. To be dependent therefore upon persons ruling arbitrarily or at pleasure, is to be every way insecure. We must have laws. We must have canons of civil and political right, universally understood, universally insisted on ; and which, having the strength of a whole people to back them, will be strong enough to put rulers themselves in check, and give a legal, a juridical tone to everything. There must be no *will* over us but that of *God and the laws*. When this is the case, and rulers are but the administrators of a settled legal economy, so as to be feared by evildoers, and by none else, the citizen, relieved of the intolerable burden of standing for ever on the lookout, at once against wrongs from above and from around him, from government and his fellow men, is free for positive employments ; free to cultivate the soil ; to manufacture its products into artificial forms ; to traffic, to acquire wealth, to educate his children ; to meet the claims of society and heaven. The great political agency has then its fit share in the division of labour : the people do by their rulers what before they had to do personally for themselves ; and this without the hazard or the fear of seeing the trust of office, which has been instituted for their defence against one another, turned into a curse of tyranny to oppress them.

True, there may be such a thing as an indulgent, kind-hearted *despot*, ruling mildly, paternally, if you please, without laws. But then, besides the extreme rareness of such characters, it must be observed that the grace of a despot can never

give us the freedom we want, because not permanently to be relied on ; and because, though it were ever so likely to continue, true freedom is of right, and not of grace.

There is a prejudice in some minds against the multiplicity of laws to which all liberal governments have a natural tendency. No doubt the best of things are often carried to a vicious excess. But let us be cautious on the other hand too ; for liberty (not to mention other objects of right) can assuredly go *no further than the laws go*. Whatever we do, or wish to do, we must have laws to attend us, laws that we can lay our hands upon, and which will effectually stand by us in the time of need. Without them we are not altogether free. And just in proportion as the duties, interests, and pleasures of life, and the pursuits connected with them, are multiplied, there should and must be a corresponding enlargement of the legal system. It is better to double-guard every point where wrongs of any sort may assail us, than to leave one exposed. Too much law is better than too little. The evil of too much is chiefly that of inconvenient bulk and complication ; while that of too little is a direct stinting of liberty to the extent of the deficiency.

Some countries require more laws than others. A large country requires more than a small one ; a country of many soils, climates, and capabilities, than one which has few ; a country that is commercial, than a land of mere ploughs and looms ; a highly civilized country, than one in a ruder state. For all these matters have to do with the variety of men's callings, and so, with the breadth of field over which their activities are to be followed and protected by public power.

How meagre, in this very point of view, does the so-called freedom of savages appear, whose whole range of occupation lies in two words, hunting and fighting—a state of things in

which a man can hardly be said to be at large, or to have the use of his faculties for any generous purpose.

No, it is law and government that sets men truly free. And when they are thus liberated, civilization opens a scene of enterprise before them to the yet further advancement of their freemanly estate. Knowledge, art, business, wealth, intercourse, taste, come forward by degrees; acting like prisms on the lights of life, and for every tint of colour visible before, presenting a thousand. Liberty, from being first nothing, and then a half-life principle, rises at length to the winged energy of an angel spirit. A wide theatre of options dawns upon the eye, and according as different minds are attracted by the various objects that invite attention, the world divides, and divides, in pursuit of them. Aims and efforts take all possible directions. Nor is there any jostling to hinder materially the freedom of individuals; for law and government are everywhere present, watching their steps, maintaining order in the midst of seeming confusion, and giving an ease of play to men's faculties in the universal movement, as if society were a vast machine, with every part so nicely fitted to the rest, that all goes on together smoothly, quietly, and without a jar.

So strictly, so entirely legal and *law-born* is that liberty, of which the praise is in all mouths and the love in all hearts, but which some learned writers theorize about, as if it were a wild fruit of the first ages, ripe before the dawn of civilization, and instead of being due to government and politic order, suffering actual loss on their account.

In discussing the subject further, I shall consider first, the right of what I may call *local* freedom, or of moving about at will, with whatever practical views not adverse to the general welfare; and secondly, the *specific application* men are entitled to make of their abilities in the way of realizing those views.

The former topic may be regarded as elementary, being a sort of prerequisite to the latter in all cases. Liberty of *loco-motion* is the power of presenting oneself in person where operative action is called for ; a necessary power, though by itself an unproductive one. How strange that it should have engrossed the attention of law writers to the exclusion of a liberty of much nobler attributes, and of infinitely greater extent—I mean, the *applied liberty* by which all useful ends are achieved.

CHAPTER II.

LIBERTY OF PLACE.

ENDOWED by heaven with active powers, we are of course entitled to make use of them. The great ends of life would be unattainable without this right, and life itself must soon fail us should the ministry of our own exertions be suspended. It is a right, therefore, of the same cardinal rank as that of vital security.

Among our active powers; self-disposal in regard to place is perhaps first in practical importance, since nothing else can well be done without it. We may employ this faculty either in going out of the country, or in pitching our residence, travelling, and attending the calls of duty, business, or pleasure, within it.

In general every one is free to go abroad, and to remain as long absent as he pleases, save only that he cannot throw up his allegiance by an absolute expatriation at his own will. Such at least is the English common-law rule, and I think it is ours also. It is in truth the rule of natural reason. Not but that a man may expatriate himself *in effect*; for he may go abroad without revealing his purpose of not returning, or he may form that purpose while absent, and his government may want the means of re-asserting its dominion over him. This, however, will not legalize his conduct. Allegiance is a moral obligation, and as such can never be cast off, either in law or conscience, at the sole will of the party bound by it. Another will must concur. It is an obligation not imposed by govern-

ment protection, as is sometimes said, but growing naturally out of political relationship. There are therefore two degrees of it, according as men are citizens in a perfect or only a qualified sense; that is to say, as integrant members of the body politic, or in the character of alien residents. Native citizens are born to allegiance, just as they are born to the duties of filial piety. Foreigners may be *naturalized* into the same responsibilities, because into the same relations with the government. They will then be full citizens, a sovereign act of adoption on the nation's part conferring upon them the enfranchisement which birth has failed to give. Prior to this, their citizenship is limited, and so is the allegiance it imposes. They may be said to come into the country under an implied condition of being faithful to the laws while here. And there is a corresponding pledge in their favour, that while here the rights of citizens shall in general be assured to them. Protection and allegiance are indeed matters of reciprocal obligation in all cases. But it is only in the rule of continuance proper to the two principles, and not at all in the reasons they are based upon, that they have any mutual dependence. Government owes protection to the unborn infant, and to the unnaturalized alien, no less than to the homeborn veteran who has fought its battles. So the citizen owes allegiance to his country just because it *is* his country, and not because his life, liberty, and property have enjoyed the shelter of its institutions. This is true alike of whole and half citizens. The alien resident cannot call it his own country in unqualified terms; there are reserves to be made; yet it is measureably his. And on the other hand, he owes it fealty and service in a reach of phrase exactly corresponding. Such as the relationship happens to be, such, in matter of extent, are its legal consequences. And since there are two parties concerned, the consent of both

is necessary to the discharge of either from their respective obligations. The withdrawal of a citizen from his country, if intended as a final abandonment, will excuse government from following him with its undesired protection. And if government were to begin the work of dereliction, by treating the people as outlaws, they might lawfully renounce their citizenship, and go where they pleased. In short, the claims of the parties on each other may be released by mutual consent, or forfeited by delinquency; but I believe there is no third way of putting an end to them.

It so happens, however, that individuals are seldom of concern enough to a nation's well-being to have the question of their locomotive freedom brought into serious controversy. In time of war or other great emergency, state orders are occasionally made, prohibiting egress for a season. Embargoes may extend to persons as well as ships. But in ordinary circumstances emigration is not apt to be interfered with, or the right disputed.

On the contrary, from the prevailing course of facts on this head, a conclusion may I think be drawn, that will turn much of the emigration which is taking place in the world into legal expatriation. Governments, as well as private persons, may surely bind themselves by tacit consents; and when the people of a country, either from difficulty of subsistence or for other reasons, are in the practice of removing openly to foreign parts with the notorious design of changing their domicile and becoming members of other political communities, the government of that country, so long as it looks on without objection, ought to hold itself barred of any further claim upon the persons of such emigrants, and to regard them as not only loosed from their old allegiance, but free to enter into new responsibilities of the same kind elsewhere. Nor is it to be doubted

that millions who in years past have withdrawn from various parts of Europe, Great Britain, and Ireland, and become citizens of the United States, are entitled to the benefit of this argument. There is a time for all things. Nations, as well as individuals, may keep silence till it is too late to speak. They may keep silence till the very laws enjoin silence upon them. It is in vain to attempt the recalling of emigrants whose leave-taking has been witnessed without a word of objection; and to say that such emigrants may not rightfully serve the land of their refuge in all possible circumstances whether of war or peace, is alike vain and preposterous. No Government can reclaim against facts of its own deliberate acquiescence, or against the natural consequences of those facts.

The law of this subject, as of most others, is a result from the just feelings and opinions of mankind. There is at present too much light, too much humanity in the world, to bear patiently with restraints of an unreasonable character upon the freedom of men's travelling movements. The old partition walls between citizen and stranger are in great measure broken down. Christianity, commerce, and the press, with the facilities of the road and sea, have nearly put an end to the international prejudices of former times. Instead of Jews and Greeks, Romans and barbarians, those unmingling elements of ancient story, we have now a republic of nations, a family of nations, a sisterhood of nations; as if the earth were parted among them more for common convenience than for exclusive occupancy; and the policy of allowing men to be as free as possible in going to and fro, has no gainsayers. Governments themselves, are satisfied of the advantage of this policy. Unwilling servants are as little worth to them as to private employers; and when a citizen or a subject wishes to be gone, the best they can do with him is in general to let him go and

welcome. After which, it were absurd to follow him in his wanderings with claims practically foregone.

The admission of foreigners to the rights of citizenship when they arrive among us, is another matter. Except for ends of residence and business it is not a thing of course, even where no positive laws of prohibition exist. Unlike the liberty of emigration, it needs a positive law to warrant it. The introduction of one bad citizen might be worse than the withdrawal of many good ones. Congress alone have power to naturalize. It is a high sovereign power. They have used it however with singular, perhaps excessive liberality. At one time they required of aliens a probationary residence of fourteen years—a term not more than sufficient, one would think, provided the object were to bring men thoroughly acquainted with our institutions before making them masters of the country. Views scarcely intelligible led to bolder measures, and the term of fourteen years was shortened to five, which is now the limit.* So that in effect all comers are received with open arms.

And when a man has once gained the quality of an American

* I ascribe this change to President Jefferson. His first annual message recommended a revision of the naturalization laws. "Considering the ordinary chances of human life," he says, "a denial of citizenship under" (without) "a residence of fourteen years, is a denial to a great portion of those who ask it." This is bad writing, but we see what he means. "And shall we," he continues, "refuse the unhappy fugitives from distress, that hospitality which the savages of the wilderness extended to our fathers arriving in this land? Shall oppressed humanity find no asylum on this globe?" As if naturalization were another name for "*hospitality*;" and as if it were what the "*savages*" had bestowed upon the early settlers; and as if it were essential to the notion of an "*asylum*!" I confess to some shame in referring to such nonsense; but I have spoken of its meaning as *scarcely intelligible*, and my language is now justified.

citizen, he is a member of the body politic in full standing, and his rights, go where he will, are ever the same ; no local authority can properly meddle with them. In whichever of the States he takes up his abode, he is a freeman of the nation in all of them ; being neither safer, nor more at self-command, in passing from county to county of the State he lives in, than he is entitled to be wherever else he goes. No local statute, no local constitution can be valid, which forbids his entrance into any particular State, or hinders him from staying or withdrawing at pleasure.

Everywhere, however, he is subject to the laws and necessary police of the land. His freedom is not an absolute principle. He may forfeit it by misconduct ; and even in his enjoyment of it he has burdens to bear from which there is no escape. It is only by holding private interests subordinate to those of a public nature, that the social system can be upheld.

In time of war, for instance, emigration, travelling, residence itself, are liable to be interrupted. Men may be forbidden to leave the country ; ordered back from the frontier ; put under martial law ; made soldiers against their will ; required to hold themselves in readiness to take the field at a minute's warning ; or led off to battle. All, perhaps, without just ground of complaint.* These are strong measures ; but it is the province of

* Late in the war of 1812, President Madison proposed (through his Secretary of State, whose project I believe it was) to raise 100,000 regular troops by compulsory draughts upon the militia of the country. It was a bold experiment, and could only be justified by an extreme emergency. If soldiers could not otherwise be had *for home defence*, and were *absolutely necessary for that purpose*, the emergency was extreme, and the design legitimate. But these facts wanted evidence ; and Congress, it appears, doubted them, for the bill was thrown out. An event at which all prudent men rejoiced. Scarce anything more

government to judge of the necessity for them. Even military officers, in local commands, may be entrusted with more or less of this formidable discretion, joined with a power of instantaneous action on the judgments they form. And if all be done wisely, prudently, and within bounds of reason, the liberty of the citizen, though somewhat roughly dealt with, suffers no wrong. It is only abuses and excesses that can oppress him. To the possibility of these he is exposed undoubtedly. And it is matter of regret to add, that Congress, by suspending the *habeas corpus*, may put off to a distant day the taking of a single step on his part towards righting himself, however real his wrongs. Such a power has been thought necessary. Assuredly the day will be a dark one that shall witness the employment of it.

Peace, as well as war, has its embarrassments, but they are lighter. The cases in which a citizen may be restrained of his right to be at large and under self-disposal in time of peace, are divisible into two classes, according as they depend upon reasons of criminal jurisprudence, or upon what I shall term the exigencies of practical government.

In the first of these classes is the great mass of crimes and misdemeanors, usually styled public wrongs. Such offences draw after them the loss of personal liberty, when of a degree to be justly punishable in that way; and the offenders, after being arrested on reasonable suspicion, and convicted by due process of law, may be confined, and have their intercourse with society cut off for a time, or for ever, according to the measure of their guilt. This is so plainly right that it requires no illustration.

adventurous, or more likely to provoke resistance, has been attempted by any administration.

Even threats, or other probable indications of an intention to disturb the peace, though not strictly liable to punishment, will yet expose the party implicated to be put under bonds of good behaviour, and in default of sureties to be imprisoned. Public order and security must be maintained at all hazards to individuals. Police is as indispensable as criminal justice. The two are parts of one system.

It is upon a principle of police that notorious vagabonds are liable to be taken into custody. Idleness, vagrancy, night walking, and the like, are vices inconsistent with the general welfare, evincing an abasement and prostration of character nearly allied to crime, and tending dangerously towards it.

Even where there is no guilt, it is often necessary to restrain men's movements. Maniacs, and persons labouring under infectious diseases, are instances. The safety of many is more important than the liberty of a few.

Pauperism itself may subject a man to restraint, so far at least as regards his settlement or place of maintenance. A pauper, unless provided for by government, or by his fellow men, must either live criminally or starve; and there seems no unnatural hardship in his being compelled to reside where they who take care of him can most conveniently supply his wants. It is a condition they may well annex to the charity they bestow. And whether the charity be private or public, can make no difference in this respect. Governments now-a-days pay some attention to the poor. It were a pity if they did not. And since they can only do it by fixed rules, the pauper who depends upon their bounty must remain in some particular locality where it can be regularly dealt out to him by their agents. And if he leave the place of his latest residence, he may be lawfully sent back to it, and detained there till he is able to take care of himself.

The oppression of the English poor laws, admitting them to have been formerly chargeable with that effect, lay not in the principle of compulsory residence, but in too broad an application of that principle, treating poor labourers as if they were paupers, and taking thus from persons to whom free locomotion was indispensable, the very liberty they lived by. It is only paupers in the worst sense that can justly be hindered from going where they will. And as to these, the evil is apparently the least the case admits of, for they might otherwise perish of want.

There is some resemblance to the restraining operation of the poor laws in that of certain laws made for the preservation of the public health; I allude to the quarantine regulations. Rich and poor alike, the whole travelling public, in so far as they come from regions apprehended to be pestilential, are brought into trouble by these regulations; and it is another instance of residence by compulsion; a residence, too, not at home, but in strange quarters; not among friends, but at a distance from them, and to the very purpose of that worst of hopes deferred, the being shut up in a lazaretto, just to put off the day of meeting them. Yet what remedy? Must not partial interests give way to those in which a whole people are concerned?

In short, whatever is clearly necessary to the safety and repose of society, however individuals may suffer by it, must be submitted to. The whole police economy rests upon this principle. And the doctrine of the rightful prevalence of majorities in a republic is neither more reasonable nor better established than that the welfare of the greater number of citizens outweighs in legal account, and must ever be dealt with as outweighing, that of the minority.

But in the next place, there is a class of cases where the

citizen's self-disposal is liable to interruption from perhaps a less evident necessity ; being cases mostly civil, and touching rather the dignity and efficiency of government in some of its agencies, than the immediate wellbeing of the people themselves.

A portion of these agencies are indeed of the highest importance, involving the sovereign offices of legislation and judicature. And as laws must both be made and executed, so these functions should encounter no needless obstacle, and never call in vain for a helping hand. Legal order is the main thing. Cost what it may, we must have it. What we pay for it may be regarded as the price of liberty itself, for liberty is by the laws. Nor can we possibly pay too dear for the object, save by paying more than is necessary to secure it.

Two duties, a negative and a positive, grow out of these considerations, and a man's right of self-disposal has a concern in each. On the one hand, it is a grievous offence to impede the action of government in its higher functions ; while, on the other, the citizen may be called upon to aid personally in its operations, and may be punished if he refuse. Under the former head, we have the doctrine of contempts, and of summary visitations on account of them ; under the latter, that of compulsory attendance upon the courts as parties litigant, jurors, and witnesses, and the serving also in a variety of petty employments, such as justices of the peace, sheriffs, constables, overseers of highways, and of the poor.

Contempts have been classed with crimes. But though they bear upon interests common to the whole community, and have much the air of misdemeanors, they are yet in some respects peculiar, and may rather be regarded as a class by themselves. They touch not the public peace, nor yet the morals of society. Life, liberty, property, fall not in their way. They are not so

much offences against the people, as disturbances of the people's *business*, the law administrations of the country.

Accordingly, these administrations must be actually going on (in legal contemplation at least) or a contempt is impossible. A man may say and print what he will of a legislature or a court not really or constructively in session at the time. It will be a libel perhaps, but not a contempt; which is essentially an insult on the authority or dignity of their *doings*, rather than upon themselves. It were well if personal considerations weighed less than they are wont to do, with those who have the matter to act on.

At any rate, offenders of this class, however severely they may be sometimes dealt with, are not treated as criminals. They are not indicted. They are not tried by their peers. The party who most *feels* the offence sits, contrary to all criminal law usage, in judgment upon it, and with an irresponsible discretion. If the wrong have been done in his presence, he commits the offender at once, and during pleasure. If done elsewhere, and brought to his knowledge by sworn evidence, he proceeds by writ of attachment, or by an order to show cause against that writ, according as the evidence is more or less positive and pregnant. Nor can the culprit always get clear by showing innocence of intention. Example must be looked to. Sovereign power, whether moving judicially or by legislation, must have free course, and no direct impediment can in general be thrown in its way with impunity.

In point of form, a contempt may be committed either by disparaging the office it obstructs, by disobeying the mandate of the officer, or by attempting to defeat the ends of the procedure that is going forward.

The usual offence under the first form is that of scornful behaviour, as by opprobrious words or actions towards a legis-

lative body, or a court of justice, while in the exercise of their functions, or by indulging passion and violence in their presence, as when a blow is given or an arrest made before their eyes.

The second form is seen where one refuses or delays submission to the command of a competent tribunal.

The third, where any gross perversion or abuse is practised or attempted, in regard to the exercise of legislative or judicial power, and injurious to the trust upon which it is held. A misbehaving attorney or sheriff, a magistrate, or a court of inferior jurisdiction, may be dealt with for contempt of this nature. If a judge or legislator suffer himself to be bribed or tampered with, he is guilty of a contempt. It is, of course, a contempt to practise any means of corruption upon him. Various abuses of the press amount to the same offence. To advertise a reward for testimony to a particular fact in a depending cause, is an abuse of this description. To publish words of intimidation towards a sitting judge, or try to raise a prejudice against him; to garble the matter of a trial by publishing one side only, while the result is yet undetermined; to mingle with a history of the proceedings any scandalous suggestions of third persons, or an incidental comment of a nature to give a wrong turn to the public mind: every such impropriety incurs the hazard of a most penal visitation. Time was when no unlicensed publication could be safely made about a cause in progress of hearing; not even a report of the proceedings, however fairly drawn in matter of fact. There is less rigour now; but still, the matter must be handled with great circumspection, or a peril of most serious magnitude may be incurred.

All which is intelligible and satisfactory. If a man will rashly thrust himself between the people and their more important affairs, the consequences ought to be such as to teach him better manners for the future.

At the same time it is impossible not to remark with some anxiety, that these consequences, though legal and reasonable in their nature, are arbitrarily measured out to the offender. The taking him into custody is evidently right; and no doubt the jurisdiction to seize and commit him must remain where it is, with the immediate incumbent of the office disturbed; for none else could act promptly enough in the circumstances to set the office free from its embarrassment, and put its duties again in course of execution without loss of time. This done, however, might not the jurisdiction as to further measures be transferred with advantage to other hands? Exalted feelings are bad holders of the sacred balance. No right of appeal exists. The *habeas corpus* does not apply. The wrongdoer is at the mercy of the party most hurt (ostensibly at least) by his misconduct. Which seems not as it should be. Where passion mingles or *may* mingle irresponsibly with the exercise of power, it is scarcely in human wisdom or moderation not to be tempted at times beyond the mark of propriety.

As to helping on the action of government by positive aids, the duty of the citizen is but the counterpart of that which enjoins him against obstructing its progress; with this difference, however, that whereas the negative duty is universal and constant, that of lending assistance to the dispatch of the public business (beyond what voluntary agents can be got to do) is only partial and occasional; few persons—comparatively few—coming within its range, and they not often. For the most part, motives of gain, or of distinction and influence, bring men to a willing entrance upon official labours and responsibilities. Yet not always. These motives fail in some cases. There are things to be done for the people, or in course of their affairs, for which agents must be found and put to work by dint of

sheer authority. The petty offices of jurors, constables, overseers of highways and of the poor, are of this description. Sheriffs too, in places where their fees are an inadequate compensation, belong to the same class. Even witnesses, and litigant parties themselves, have duties to perform that draw considerably on their freedom of self-disposal, but from which, for reasons of a public nature, they cannot be let off.

Jurors are a sort of civil conscripts. They serve from necessity, being generally drawn for and notified beforehand. Yet it not unfrequently happens that a deficient panel must be perfected by a sort of *coup-de-main* upon bystanders. Men are suddenly laid hold on by a sheriff's deputy, without the least warning, and led up to the jury-box almost before they know it. A pretty vigorous exercise of power. Free-men, however, must not complain of an institution which especially signalizes, while it is also calculated to uphold, their high estate.

The case of witnesses is yet more trying. They too attend upon compulsion. Not only so, but in suits of a criminal nature they are sometimes forced to give security beforehand to answer for their being present at the time and place appointed; or in default of bonds for the purpose, to go to prison and lie there till they are called for. A grievance of no common magnitude, and which shows the unmeasured stress that the laws lay upon the business of the courts.

Of parties litigant, the plaintiff is of course a volunteer in his first movement, though he thereby subjects himself to a jurisdiction which may constrain him afterwards.

The defendant's case is apt to be worse, at least in the beginning; for he may, in some of the states, be arrested and sent to jail upon a mere civil demand, unless he can find bail to answer for him. A cruel remnant of old statute law, so

long in use that men do not readily awake to a proper feeling of its barbarous injustice. Let us ponder the subject for a moment.

The matter may be regarded in two lights, as arising under initial, or under final process.

Of the primary arrest the most plausible explanation would be, that it is a means of calling debtors into court and subjecting them to the coercion of the laws. To which the answer is, that they can be brought to this by means less inconsistent with the liberties, and less revolting to the manly sentiments, of a free people. Who doubts that whipping might subserve the ends of discipline in the army or navy? And till a very late period it was every day's practice in one branch of the service. Not so now, and never again to be resumed, if discipline can possibly be maintained by other means. How frequent are the complaints we hear against the New England practice of commencing suits by property attachments; a sort of executions in advance, that seem to violate the rule of holding men innocent till they are proved guilty. Yet it is only a harsh method of citation; and we forget, when we object to it, that to seize the person, as was habitually done in New York till a quite recent day, and is still done in other states, is a method as much harsher than that, as the nerve of liberty is tenderer (if not indeed more vital) than the nerve of property. All *needless* rigours should be spared. And we have learnt by experience that men may be effectually cited to judgment without violence of any kind.

Even when the result of a litigation is arrived at, it does not follow that a guilt amounting to mere civil default, though duly ascertained, will justify the shutting the debtor up *in execution* as the phrase is, or sending him to jail under pretence of *satisfying the judgment* (such again is the phrase) with his

incarcerated body. The whole thing is a mockery. What satisfaction, what advantage, can the creditor receive from an outrage on the flesh and blood of his debtor? Payment is neither to be hastened nor facilitated by such means. In general men need their liberty to the very end of providing for their debts. What then is the design? Is it punishment? Surely not, for crime is not imputed. There are fraudulent debtors no doubt, but imprisonments are not limited to them; besides which, their frauds are soon technically merged in judgments of mere debt, and there is no discrimination of debts after judgment. Why, then, should judgment debtors be imprisoned?

Why, but because the makers of imprisonment laws have leaned insensibly to the creditor side of the account, and acted more in feeling than in wisdom or justice? An unpaid demand is apt to stir up more or less resentment in those who give their thoughts to it, forasmuch as their sympathies, unless they know the facts minutely, run naturally enough in favour of the party who is thus kept out of his right; and it would seem that legislators, like other men, have generally acted under a bias of this kind. Statutes of imprisonment, and even of citation by attachments of property, prove it.

Debtors, it is true, are admitted to bail; that is, if bail can be found. But so are culprits of all but the very worst grades. In which respect the criminal and the debtor are upon a par. Unfortunately the boon is often useless to both the one and the other. A poor man, or a stranger, may be none the better for it, however fair his character and his intentions. There are thousands of merciless persecutions by the law of civil arrest, which no bail laws can avert.

It is remarkable that unliquidated claims are commonly treated as exceptions to the doctrine of arrests. Let us venture

a comment upon this. Such claims, because they do not suggest the precise relation of debtor and creditor, make no appeal to the feelings of those classes, or to the sympathies of others with them. A man may be guilty of any sort of trespass, and unlike a mere debtor, may in truth deserve punishment; yet he is not liable, as of course, to be held to bail. It is not till this state of things is changed, and a verdict and judgment rendered for a liquidated sum in damages, making the successful party a *creditor* in the full force of the term, that the means of creditor vengeance are let loose; the law becoming fiercer as the occasion for its displeasure passes from a tortious to a business form, that is, from a more aggravated to a milder one, and dooming him who could not be touched in his liberty for a flagitious wrong, to be seized like a felon for the price he is adjudged to pay for it in money!

Debts are sacred things, but liberty too is sacred. The just demands of creditors must be enforced, but it is neither necessary nor expedient that debtors should be put in bondage for that purpose. Happily, reason is beginning to resume her sway in the matter, and the minds of men are becoming reconciled to her decisions.

Saving however all questions of detail, the general truth is clear, that government has many just claims upon us which are seemingly inconsistent with our rights of local freedom; and there is no avoiding the conclusion, that in submitting to these claims we do but acknowledge some of the inevitable conditions on which that freedom is held. We are not absolutely free. It is impossible we should be. The burdens of government are unavoidable qualifications of our rights under it, provided always that these burdens are no heavier than is needful, and that the distribution of them is without respect of persons. In which view of things, they belong essentially to the freeman's

lot. They are ills that he is heir to, and must make the best of. They wrong him not. They disparage not his freemanly condition. They are entailed upon him by the very exigencies of the system that makes him what he is.

Unhappily there is another kind of ills to be noticed in this connexion—ills that the laws inflict not, but condemn, and to the utmost of their power withstand. Let us consider some of these.

The motives that lead to encroachments on the free motion and action of an individual are more, not to say worse, than those to which the safety of his life is exposed. Whatever wars upon life, endangers liberty too; while liberty, on the other hand, encounters some perils that are all its own.

The wrongs to which a man's right of self-disposal is chiefly liable, are reducible to three classes: false or unlawful imprisonment, which operates by mere restraint, to keep him from doing what he would; duress, the suffering or fear of corporal harm, by which he may be forced to do something he would not; and slavery, a sort of protracted duress, subjecting him permanently to the service of a master. A word or two of each.

1. As to false imprisonment, or the unlawful detention of a man's person under custody, it may be by colour of law or without it.

If by colour of law, it will be in one of the forms already spoken of, involving some charge of crime or contempt, or the service of process in a private suit. If without such colour, the form may vary indefinitely.

The redress in either case is twofold: release from custody, and damages for the injury done.

Sometimes the party will be discharged at once on examination before a magistrate. If not, a *habeas corpus* may discharge him. At the worst, a trial must be waited for.

In giving damages for this kind of wrong, juries are liberal. Where there is malice, and no probable cause for the arrest, they weigh everything freely against the wrongdoer: loss of time and money, wounded feelings, character, and whatever circumstances of aggravation happen to present themselves. The jury office is then a stern and vindictive one: avenging the laws, inflicting punishment where it is due, and doing all that is possible to save society from the recurrence of such offences.

I remember no instance of false imprisonment as for an imputed contempt, but the thing is certainly possible; though a person who should wantonly put a court of justice in motion on a pretence of that nature would himself be guilty of a contempt, and might be visited accordingly, as well as by action.

Liberty is the laws' fosterchild, and their leanings are strong in its favour. Even when a crime is committed against the public peace, it is not every one that can arrest the criminal. Besides commissioned officers, none can safely seize him, save the few who may have seen him in the act, or freshly pursued him, as upon hue and cry, or the like. Mistakes are serious things in such cases. Even ministerial officers can in general do nothing without a written warrant, which again can only issue upon sworn evidence, or a magistrate's personal knowledge of facts; and so strictly are the rules adhered to, that when a man's liberty is attempted to be taken from him irregularly, he may defend himself at every risk to the aggressor; for when liberty is gone, life is worthless. It is seldom best to act without reserve upon this principle, but the right is well established.

2. *Duress*, an injury of less frequent occurrence, is the being constrained to do something against one's will, by a violent motive, that leaves no freedom of choice. It is either by actual

suffering, or the imminent peril of it, unlawfully and tortiously forced upon a man, or made a means of influence over him, for wrong purposes.

The constraint itself considered, apart from the external facts that occasion it, I am not aware of any redress that can be had, save the invalidating whatever promises or other engagements it may have been resorted to by the wrongdoer to extort, with consequential damages if such have been incurred. A bill of exchange, obtained by duress, would be null; and in case of its being paid before the injured party could interfere to stop the payment, the money might of course be reclaimed. And as civil acts are held void, so criminal ones would in general be palliated, and often excused, when owing altogether to a cause of this nature. To which end, however, courts require very clear and decisive proof to rebut the presumption of a guilty intent, suggested always by the deed itself. Such proof made, the law must I think be satisfied, at least when the degree of the offence is not above the class of misdemeanors.

The outward facts, in a case of duress, may constitute a wrong of greater or less degree, from misdemeanor downwards. And they may accordingly be visited by indictment or by action only, as the measure of their turpitude requires.

3. The *slavery* question has been much debated. The argument seems to me a short one.

Let us assume a state of things the most favourable that can be to the slave-holder; such as possibly may never have occurred anywhere since the time of the ancient Germans: let us assume that a man has given himself up to endless servitude *by free contract*, uninfluenced by fear, or other violent motive. This indeed would not be a case of duress, but only what may be termed a hard bargain. The question is, would it stand in law?—the law, I mean, of nature and of first truths.

How could it stand? Are we not accountable to God for our actions? None probably will deny it. Suicide itself were otherwise lawful. And why is suicide not lawful? For this allsufficient reason: it is an unwarranted desertion of a post of duty assigned by the supreme governor of the world. How can one who is accountable for his actions put an end to them midway, or refuse to perform further? Of the direct wickedness of self-destruction, under the divine law, I speak not now. Its consequential guilt as a cause of necessary delinquency in the great trust of life, is enough for the present purpose. What are we made for, if not *to do* at God's bidding? Even heathen minds know this, and how to reason from it.* Christians, I should think, can hardly be less wise on such a point.

Well, then, we have a part to act in the vast drama that is going on; and how are we to act it? With our hands only? or with our heads, hearts, and hands, all together? Mere instruments we certainly are not. Our accountability proves that. We are rational as well as voluntary agents; and the actions we have to answer for involve the use of our best faculties. Does any man doubt it? To please God, to fulfil the part assigned us in the economy of his providence, to escape the condemnation of those who bury his gifts, or throw them quite away, we must employ our reason, our enterprise, our will, together with our hands, in his service; in a word, we must be free.

Suppose a man, instead of putting an end to his life, should undertake to rid himself of its burdens by some act of incurable self-disqualification for its offices; would he be guiltless? Sup-

* "Quare et tibi, Publi, et piis omnibus, retinendus est animus in custodia corporis, nec injussu ejus, a quo ille est vobis datus, ex hominum vita migrandum est, ne munus humanum adsignatum a Deo defugisse videamini."—CICERO.

pose his reason lay within reach of a drug that might destroy it, how much better than a murderer would he be to take the poison? And is not self-disposal just as necessary to him as the reason that guides it? Of what avail can this be without that?

Upon the assumption therefore that we are under God's government, owing perfect obedience to his will as far as we know it; in other words, that we have really a part to perform at our peril as his creatures and subjects; it seems a very obvious inference that we cannot bind ourselves to slavery though we should try to do so. The relations we stand in do not admit of it. We are not at liberty to disable ourselves for the service appointed us; not at liberty, that is, to throw our liberty away.

What if a man should undertake to sell his *life* to another? Could the buyer innocently take it from him? Life might as well be sold as liberty, regarding both in their totalities. Both are ours certainly, *but not to sell*. The one or the other may be parted with in matter of fact, but to convey a *title* to either by an act of cession or agreement, is plainly impossible.

How absurd then to imagine, that he who cannot doom himself to slavery, may yet be made a slave by others, *against his will*. Have others a better right than he to dispose of his freedom? Would it interfere less with the divine economy to have him dragged by them from the path of his duties, than if he went astray by his own choice?

It is in vain to talk about emergencies, as giving a natural origin to slavery. War justifies the taking men prisoners, but what has it to do with turning prisoners into slaves? There are misfortunes of civil life that make sad contrasts in society: great relative weakness and dependence fall suddenly upon individuals, making them fit objects of peculiar kindness and

charity : but how the unspeakable curse of personal bondage can be made to take the place of christian alms in these circumstances, I see not. Slavery, in short, admits of no reasonable explanation. Wherever it exists, it is *actual only*, without colour of legal origin or fitness, and upheld by force alone. There may be forms of seeming law in support of it ; and they may constitute, in certain places, the popular evidence of what is orderly and fit in the matter ; but to talk of *jural* slavery were a contradiction in terms.

Accordingly, the chief argument by which the holding of slaves is sought to be justified by its advocates, is founded in the positive arrangements of the country. There are local usages, and local statutes for it, no doubt ; and if men would rest here, we might safely leave them to their repose. But they go further, and insist that slavery is legalized in America by the federal constitution itself. A startling proposition, which it becomes us to get rid of if we can, by refuting it. Let us try.

Two assumptions are involved : first, that the framers of the constitution had *power* to legalize slavery in particular States ; and secondly, that they exercised that power.

If they had the power, where did it come from ? Their constituents were partly slave-holders, and partly not. The slaves had nothing to say, and of course gave no consent. Could the community of masters delegate such a power ? That would imply that they had it to delegate, and so, that slavery was legal already in the broadest sense ; which is contrary to the supposition of its being sought to legalize it by the act of the convention. But the masters wanted, it may be, better evidence of title than they had to their slave property. Could they get this by appointing agents of their own to give it to them ? Hardly. The stream could not well rise above the fountain ;

nor could a show of deceptive forms be made to stand, in a community like ours, for anything substantial.

No power then to legalize slavery came either from the slaves or from their masters. There was yet a third class of inhabitants, the freemen of the country who possessed no slaves. Could it come from them? What right had they to meddle? They were strangers to the whole interest involved; and how were deputies of theirs to be invested with authority for placing that interest on a new law basis as between the parties to it? As well might the man in the moon distribute land titles upon earth.

So that the convention fathers were utterly impotent in the matter. There was no one source from which they *could* be authorized to put chains upon a portion of the people, or to bind them to existing servitudes. That there were slaves in certain localities was of course known; but there was no occasion, no opportunity, I may almost say, to meddle with it for any purpose. Wrong as it was, the people of the slave districts scarce felt it to be so. At any rate, they felt no insecurity of title on that score. Nor indeed was federal power the fit means of fortifying their position as masters, had they even sought its aid; for there was no compatibility between the means and the end. Slavery was not only a *local*, but a purely *civil* concern, whereas the jurisdiction of the convention patriots was altogether *political and general*; so that instead of having any power for confirming the "peculiar institution" of the slave states, the powers they actually held were of a nature to exclude the very thought of such a project from their minds.

And it so happens, finally, that they attempted nothing in that line. Slavery is not so much as mentioned in the constitution. Much less is any provision made there for upholding it.

True, the fathers stipulated (if by "persons held to service" they meant slaves) that there should be no interference with slavery on the part of the free States. And thus far they were surely authorized to go: for first, it was not meddling, but a promise of abstinence; and secondly, the very deficiency of the power to meddle made it right to say they would abstain. And there were motives of a general, not local character, political not civil, inviting urgently to this. The welfare of the country was at stake. Its very pacification hung upon a thread, which they would have cut by any other course than that of leaving local institutions to the undisturbed sway of local power. Hence the assurance, so frankly and wisely given, that fugitive servants (slaves, if you will, by interpretation) should not be officiously harboured in the free states. Instead of which they were to be "delivered up." Not indeed by popular violence, as some grave senators have construed the provision: that were inconsistent with the very peace of society; for by the laws of a free state every member of society is deemed free, as well as innocent, till proof made to the contrary. To seize therefore upon any one, except for reasons of criminal justice or police, were a trespass, an assault and battery, a false imprisonment. Was it expected that men should become voluntary peace-breakers in order to fulfil the terms of the great compromise? Were they to turn rowdies, and commit indictable offences, by way of duty to the constitution? There is a more reasonable alternative. The "delivery up" was to be *by legal process*. Nothing more. And this in pure deference to the *lex domicilii* of the runaways—a deference made necessary by considerations of a public nature, and not at all constrained by a regard for the peculiar interests of slave owners.

If slaves were mere property, the three fifths rule of representation, as it is called, would look vastly more like a con-

cession to those interests. But they are *not* mere property. The constitution speaks of them as *persons* again and again. It calls them nothing but persons, with the single qualification of being "held to service." So that, by the scale of constitutional ideas, the three fifths rule itself is anything but a concession to the interests of slavery.

Indeed, will not the subject bear to be considered in a more positive light? The cautious reserve maintained by the convention, in never speaking of slaves or slavery as such, appears to me significant of one or other of two things. Was it repugnance of mind that occasioned this? It might be so in part. But I ascribe more influence to an historical fact of the period: I mean the fact of a then extensive public opinion and belief, that slavery was soon to die out altogether, and be gone. The process of its evanescence was already begun and going on; and as the constitution, God willing, was to last for ever, why blot its fair pages with words of shame which by-and-by would have no meaning but for antiquaries? Americans of all hues were at length to be free. And with a chancery forecast, regarding that as done which ought to be done, and viewing the checkered present in the light of the hoped-for future, the founders of the government made it *for freemen only*—freemen *to be*; building their fabric on the broad basis of the declaration of independence. Instead of attempting to give permanence to an institution which none was then fool enough to commend, they saw in slavery a local evil, which local legislation was beginning to master, and would soon probably exterminate. Looking hopefully to this result, and regarding the great whole of the country as, in *destiny* at least, a whole of free citizens, they modelled their work accordingly, and gave us a constitution of free government for all.

It thus happens that while our landscape is disfigured with

here and there a particular deformity, its general aspect is as beautiful as it is grand. *Politically speaking, we have no slaves, and no disparity of ranks*; nothing to bring reproach upon our boasted equality principle.

The taunts of maligners are unfounded. Our constitutional liberty is as catholic as our jurisprudence; a thing of common right and common measure for all, subject only to the modifications and burdens unavoidable in practice, and which the circumstances that occasion them at once explain and justify.

This liberty, analytically considered, is partly locomotive, partly ulterior and effective: the former being first in order of philosophy, while the latter has a length and breadth of application that makes it emphatically the great theme of the subject.

Locomotion is the rudimental fact of liberty; necessary to most ends of active life, and yet comparatively littleworth by itself. The soul of rational freedom lies beyond. It is the power of *doing*, after one has got to the place of exertion. Here is room for enterprise, for versatility of effort, for a large, high, generous use of the faculties. Our local self-disposal, compared with the ulterior activities to which it ministers, is like the function of the feet compared with that of the hands; important, indispensable indeed, yet not productive in general by itself, nor capable of much improvement save in outward facilities and helps, such as roads, bridges, vehicles, and the like. These accessories are of great importance. The feet move slowly till the way is pioneered, and aids provided. To remove obstacles, and supply accommodations, is therefore to save time to their service of the hands: a good end, which it becomes the government of a free country to promote as much as may be. The policy of guarding liberty from interruption is neither more evident, nor more imperative in its

claims on such a government, than that of smoothing the path of its racefield, and cheering it over the course.

How admirably the great contriver has adjusted the rules of what men *ought to do*, to their capability of *attendance* for discharging the obligation. Every one, in order that as little time as possible may be lost in going where exertion is required of him, is placed in general in the very focus of his duties, which proverbially begin at home. Thus situated, he sees his theatre expand around him in concentric circles, from his family to his ville or neighbourhood; thence to a larger district, his township, his county, his particular state; next to the nation; and finally, to the whole world. What a scheme of adjustments for bringing the very utmost of social usefulness to pass.

CHAPTER III.

LIBERTY OF PLEASURE-SEEKING, OR PURE SELFISHNESS.

SUPPOSING a man to be at large and at his own disposal, the next thing to be considered is, what he shall set about; in other words, what ends he shall aim at in the use of his faculties, what means employ, what effects bring to pass if he can.

There will of course be great diversity of choice among individuals. Laws, government, civilization, have so multiplied the objects of human desire, and the ways of coming by them, that the range of options is almost unlimited. Some callings will be rushed into, it is likely, by whole ranks of men at once; yet with such dissimilarity of ideas, plans, abilities, habits, that each one's liberty will have in its development somewhat that is different from all the rest. There will be lawyers many; farmers, manufacturers, and merchants many; but every individual after his own fashion, and with divers peculiarities; while, as between callings professedly distinct, the dissimilarity will be yet more striking.

The world, in this view of it, is consequently a place of infinite bustle, and much seeming confusion. All sorts of things are doing in all sorts of ways. The doers are rational agents, but their reason teaches them unequal lessons, and there is nothing they are thoroughly agreed in. Every virtue, every vice, every noble, every base principle is at work; wisdom and folly wave adverse sceptres over the mighty scene; order and disorder struggle everywhere for the mastery, each gaining and losing it by turns; the prizes of more than one world are

contended for, and the spirits of more than one are in the strife.

Looking carefully into the maze, however, we shall find it capable of being threaded. This vast display of interwoven and multifarious activities appears, on close examination, to resolve itself into the concerns of a few great practical departments of human interest, marked out by certain fixed and permanent relations, in one or other of which all actions are performed : the relations, I mean, of the creature to his maker, of the citizen to the commonwealth in its organic form, of man to man in society, and of individuals, if I may speak so, to themselves. Motives indeed are often mixed ; but the doings to which they prompt are fairly distributable into classes which, in point of general bearing, are more or less characteristically marked as *religious, political, social, and selfish*.

Some men at all times, and all men frequently, act for themselves alone ; neither their fellow mortals, their country, nor heaven, interposing a decided check or qualifying influence to the pursuit of *mere enjoyment*. The motive is not unlawful, though, if left to its own ways, it will lead infallibly to things that are so. There are natural appetites which cannot be otherwise than selfish. The pleasures even of refined taste, and of learning, partake often of the same character. But for the most part, selfish pursuits are comparatively low-minded, not to say vicious. Men follow them with sordid, narrow views ; living for the moment only, and taking present excitements, amusements, luxuries, debaucheries, for the greatest good.

Another class of persons open their eyes a little wider and look further ahead, though still with a field of vision all too limited and secular for the highest wisdom. These too are seekers after happiness ; but unlike the men of mere pleasure, they are fain to provide for it by laying up stores for a future

period, to be enjoyed, it may be, by others as well as themselves; that is to say, the good of others, to some extent at least, is not indifferent to them, much as their own good may predominate in the scale of motives. Now and then religion itself, like the shadow of a cloud in a sultry day, will flit across the pathway of their thoughts; leaving however, like the cloud, no trace behind. Their province is the world; and they work hard in it, for such a hereafter as their minds can look forward to—a time-limited hereafter. These are the *men of business*.

Again, in reference to the government of the country, there are important powers to be executed by the people in their capacity of *electors*, and rights and privileges of various kinds to be claimed and enjoyed by them as *citizen-subjects* under the laws; all tempered and modified by corresponding duties, and forming a most interesting department of affairs for men of every class. It is a walk of liberty unlike all others; agreeing, however, with epicurean and with business liberty in this, that it is temporal and earthly.

One field of action more may be contemplated. It is a field where interests larger than the world, and more enduring than time, are cultivated. The *men of conscience and religion* have a freedom most peculiarly their own, however late the discovery that has been made of it as a thing entitled to legal protection. It concerns their relations to the supreme governor.

Such, then, are the four several provinces of *applied liberty*: one indicated by a small circle which the citizen may draw around him with his staff—the petty, paltry circle of self-gratifying pursuits:—another, much larger and more respectable, involving a measure of social concerns, and giving play to the desire of permanent acquisition and accumulation, to the advantage of the general wealth:—another still, sug-

gesting the notion of a superior, though human power, and raising men to a connexion with the political state:—last of all, a theatre of action broader than the state itself, and more elevated, stretching even beyond the bourne of time, and exhibiting the noble spectacle of mortals seeking after immortality, citizens of earth, aspiring to the citizenship of heaven.

These topics have been unaccountably overlooked by law-writers. Let us do them what justice we can in a first attempt of the kind.

Of all the forms of applied liberty, that of indulged appetite or passion, the doing one's pleasure for ends purely or principally selfish, is the lowest in dignity, and the least valuable upon the whole to its possessor. With a few distinguished exceptions, which those who have tasted the luxury of science, letters, and the liberal arts, know how to appreciate, *pleasure-seeking* is a sensual, a degrading pursuit. It calls into exercise very little intelligence or reflection, puts reason to few efforts, and draws with meagre parsimony upon either the virtues or the powers of the mind. The general absence of intellect from its operations, and of benevolence from its aims, gives it an air of meanness and vulgarity, as unlovely almost as the consequences it is apt to entail upon men's habits; of which the idler, the gambler, the drunkard, the glutton, the debauchee, are samples. Bad principles, like the souls of brute animals, tend downwards. Pleasure is indeed a good thing, and a lawful object of pursuit; but they who follow it as a calling, do so invariably to their own abasement, and not unfrequently to their speedy ruin. The truth is, earthly pleasure is *for refection, not to live upon*: a distinction far too much neglected. Men have *work* to do, which a great deal of self-indulgence fatally interferes with, and in two ways: con-

suming the time due to it, and impairing the faculties with which it is to be done.

The laws, accordingly, do less for liberty in this voluptuous line than in any other. For while they allow no man's enjoyments to be rudely broken in upon by his neighbours, and do not themselves complain, so long as public morals are untouched ; they yet are too sagacious in the matter of the divine polity, and too wise in the great interests of their own, to encourage men in living like the beasts that perish. Encouragement, indeed, were needless. Men are too prone at all times to the down-hill course. To forbear restraint is the utmost that can be expected of the laws in any case of the kind. And this itself is often more than their regard for the general welfare permits.

But how are they to restrain us, supposing that necessary ? By contracting our liberty ? No ; but by preventing us from going beyond its true bounds. It is only when our practices become vicious and exceed those bounds, that we encounter legal obstacles. Till then we are within the bulwarks of the constitution, and cannot regularly be meddled with. The courts and the legislature are to judge what measures of security are requisite on the side of social order and propriety ; in doing which they may err. But allowing for this, the rule is strictly constitutional, that men's liberty of pleasure itself can be no further hindered than the general good imperatively demands. Neither a judicial decision nor a statute, that should wantonly, that is, without apparent public necessity or reason, curtail the innocent enjoyment of a citizen, would be valid, however it might be for a time upheld.

But even where restraints are lawful, there is difficulty often in applying them. How are courts to get evidence which they can safely act on with regard to an offence of which the pepe-

trator is himself the sole object? There are many such offences. And though the needed evidence were obtained, what scale of punishments can be devised for a guilt so peculiar and so hard to graduate?

Something however may be done. The laws, it is a comfort to know, forbid all vices whatsoever. And as often as extreme cases occur, flagrant alike in evidence as in guilt, they may be visited effectually, notwithstanding the wrongdoer be the chief victim of his own misconduct. Let us advert to some examples.

A person of *habitual idleness*, who strolls about the country and can give no satisfactory account of himself—a pauper in prospect if not actually such, and ready for misdeeds of any kind—may be deprived of the liberty he thus abuses. No man has a right to be a vagabond; and much as he punishes himself by being one, the laws have a penalty of their own for him; they will lock him up.

Habitual drunkenness, in like manner, is a wrong as well against society as against the individual who makes it a means of his own self-destruction. A man may make fearful approaches towards it and escape the laws. Tippling is a thing of insensible degrees. But when the drunkard has become habitually such, and self-respect and character are undeniably prostrate, he may be taken in charge, as if he were a lunatic, and be stripped entirely of his means of further bestiality. There are statutes of considerable rigour for the purpose in some of the states; and the common law of misdemeanors is also applicable in extreme cases, with yet more penal effect.

Might not this vice be advantageously dealt with at some earlier stage of its progress? And do not the interests of society call for a serious consideration of this question on the part of government?

Profane swearing and *sabbath-day amusements* are other items in the same account. These offences are punishable in all the states, I believe, by statute fines; and if very aggravated and notorious, they may be reached by indictment at the common law.

Eavesdroppers and *defumers* come next. I have met with no judicial notice of the former as infesting this country; but of the latter there is store of instances. Defamation, however, must be written or permanent, in order to being adequately visited. It is then a misdemeanor. Oral slander is not regarded as a public offence, nor can it even be reached by private action but in a very stinted variety of cases.

There is a kind of culprits (doubtless of the pleasure-seeking class) called *scolds*; and when they ply their vocation to the frequent disturbance of a neighborhood, so as to attain the degree and designation of *common* scolds, they are indictable as nuisances.

Scolds, eavesdroppers, and defamers, are characters of one dignity, and find probably about one rate of enjoyment in their several callings.

Another vice, which men are drawn into by thousands, and with very mischievous consequences to the general welfare, is *gambling*. They are tempted by the pleasure of excitement, which excitement they contrive to keep up and enhance indefinitely by adding risks to chances, till at last their sensibilities, principles, characters, estates, all perish together.

Games of chance, it is true, are not unlawful as such. But in the excesses and abuses to which they naturally tend, their destructive bearing on the morals of those immediately concerned, and on the happiness of families, has induced many of the state legislatures to pass penal enactments on the subject; while at common law, notorious gambling practices give a dis-

orderly character to the houses where they are indulged; and even the furnishing accommodations for gamblers in particular haunts is indictable, as ministering to profligacy and increasing the number of its victims.

To which add *bull-baiting, cock-fighting, horse-racing*, and the like, which are all objectionable both for cruelty and for immorality in other respects. Cruelty is itself a vice. And what can be more pernicious to the habits of society, or more dangerous to its moral tone, than the calling multitudes of human beings together, male and female, old and young, rich and poor, respectable and infamous, and pressing them into a promiscuous huddle, to be acted upon by a great general excitement, in which they are to hold unblushing communion for the time, like bathers in a common bath? The underplots of the piece need not be dwelt upon. Drinking and betting aside; swearing, juggling, thieving, out of the question; the single fact that virtue and vice meet familiarly and shake hands, while gentlemen and jockeys change places without knowing it, is quite enough to indicate the consequences that must follow as regards the body politic.

Upon principles of natural law these sports are wrong; and for the most part they are so held throughout the country. The common law itself would seem to be against them. Why should rope-dancers and travelling tricksters of all sorts, that draw crowds of people from attending to their own affairs, and cause them to spend their time, money, and good morals, in idle dissipation—why should they be punishable for exerting such an influence, and yet worse offenders of the very same general stamp go free?

Unfortunately the legislatures of some of the states have been induced to take the sports of the turf under their particular patronage, for the improvement, it is fondly said, of

horse-breeding : a poor and inadequate object at the best, even admitting it may be measurably secured in that way, which yet is doubtful. Should the right breeding of *men* be postponed to that of the animals they ride ?

I must also mention in this connexion that enticing branch of metropolitan amusements, the *theatre* ; not that the laws should undertake to put down theatrical representations by direct means, if at all ; but because the subjecting them to a considerable tax by way of license (which has been much spoken against) deserves apparently to be continued wherever it is now practised, and to be introduced where it is not ; with this addition too, that the burden be so managed as to discourage effectually all *minor* establishments of the kind, and leave no chance of permanence to any, but upon terms of possessing extraordinary merit in their way. A theatre for low life can be nothing but a pest.

It would seem also that a more searching police is wanted in our play-houses ; a literary as well as an order-keeping police, to prevent at once the enacting of exceptionable pieces, and the presence of infectious corruption among the spectators, so far at least as to have no cheap places for the profligate poor, and none at all for females unattended by protectors of the other sex.

It has been said that dramatic entertainments are a necessary evil in a great city, for that if people are not allowed to go to the play they will do worse. Without entering into that argument at present, let us hope that the evil's being thought necessary, will not be held a reason for refusing to correct abuses not essential to its attractions, and by which its bad influences are grievously aggravated.

Even sports of the *woods* and *stream*, which are among the least objectionable of any (cruelty being their only vice per-

haps, when used in moderation) must submit to some restraints both in point of season and method: this, for the sake of interests much less vital than those of the public morals—nay, not vital at all, but only suggested by the policy of making the most of our resources in the way of game and fish-food for the common weal. Game laws, like those of England, would of course be intolerable here. They would defeat the very policy referred to. But laws limiting the destruction of game to particular seasons; forbidding the use of drugs that might destroy much of it to no purpose; securing fair play, in short, against untimely and irregular waste of the public wealth in this important field of production; are not only reasonable but of great and evident advantage to the people at large. Wild animals, whether of the land, the air, or the water, are with us a common stock for all who can take them. And what all are thus interested in, must be taken care of for all, with that equality which becomes our institutions.

There is a vice of the voluptuous kind that is fearfully prevalent in many places, and against which, corrupting and pestilential as it is, we are provided in most of the states with no legal defences, save what the common law, which only grapples with extreme cases, has brought down to us from ancient times. I allude to the vice of *lascivious excess*. It would be hard to overstate the evils of this plague. Drunkenness may have more victims, taking city and country together, but lewdness is the Apollyon of the towns.

And what is to be done? Disorderly houses may be put down by indictment; but what is a disorderly house? A common brothel? No; not till it becomes noisy, turbulent, riotous. A little prudence in the management, and all will pass without rebuke. Indictments, therefore, touch not the thousandth part of the mischief, even as to the matter of brothels.

And how as to private instances of adultery, seduction, and the like? An action will lie for damages, it is said. Sometimes it will; but much more frequently that remedy fails for want of proof; and oftener still, for want of hardihood enough in the aggrieved party to face the unfeeling world in such an action.

What, I repeat, is to be done? Is it not time to make trial of other remedies than those we are accustomed to?—remedies both sharper and more comprehensive?

Let the absurd notion that this vice, as founded in natural propensities too strong to be subjugated, is to be mildly and compassionately dealt with, have an end. How can a Christian people abuse themselves with such conceits? Does the divine law drive thus? Is it thus that the best interests of mankind are to be vindicated? Why wait for houses of infamy to ripen into that extreme of profligacy which the laws term "disorderly," before laying hands upon them? Should not every notorious haunt of incontinent vice be broken up without ceremony? Ought not houses, even of occasional assignation (perhaps the worst of all in their consequences) to receive like treatment, wherever the evidence of their character is flagrant? Nor should individuals of either sex, concerned in keeping up or frequenting such establishments, be spared. At any rate, an effort should be made to correct the manners of the times in this respect. Perhaps infamy should be part of the penalty—an infamous publicity at the least. And whatever may be attempted, let it not be done with that sickly gentleness of touch that might betray a sympathetic infirmity of mind in the legislature, but with surgical energy, applying to gangrene in morals, as in vital existence, the cautery and the knife. Let the whole list of sexual offences be declared criminal, and fines and imprisonments their condign penalties. And when the law is thus reformed, let it be executed as the cause of public virtue

demands. Peradventure the work might prosper and result well. If not, there will be time enough for despair when it has failed.

With exception of this particular subject, there is little to complain of in the treatment the laws bestow upon the self-indulgent errors and vices of mankind. They do what they can. In principle, they are against all manner of wickedness, however private, however confined in its effects to the parties guilty of it.* But their restraining influence, from the very nature of the case, is less available in regard to men's voluptuary abuses and excesses, than to almost anything else. There are great difficulties in the way. The genuine liberty of the citizen must not be straitened; and the assertion of a jurisdiction to control him, even when he wanders, must depend, if not in every instance, yet generally, upon a comparison of the probable benefits with the probable inconveniences to arise from the interference. Law practice is imperfect at the best. The evils attending it are very serious. It may not always be possible to say beforehand whether corresponding benefits are to be looked for. Public order and public morals with a view to public order, must be maintained. This is the great object. Generally speaking, results can be calculated in advance. Where they cannot, the problem of administrative duty is only to be solved by an experiment.

* Blackstone's language on the subject is too tame and qualified.

CHAPTER IV.

LIBERTY OF BUSINESS.

THE next topic in order is a freedom of very large dimensions, extending to most of the concerns of ordinary life, giving scope to all the faculties both of mind and body, and having an importance and a dignity far above the mark of mere pleasure-seeking. It is the liberty of *business men* as such.

We may consider the matter with reference either to the choice of pursuits, or the economy of the laws respecting them.

In general men are free to choose for themselves what avocations they please; castes are foreign to our system. Every one determines independently upon the line of life he will follow, takes to one employment, passes from one to another, or engages in several at once, with entire self-disposal.

All however within certain extreme limits. No citizen is free to choose the craft of a highwayman or a pickpocket. None can lawfully set up a gaming house or a brothel, or get his living as a travelling mendicant, though without crime; the general security, the public peace, the morals and good order of society, being paramount interests. The great principles on which the common welfare depends are necessary landmarks to the liberty of individuals.

Nor are these landmarks always permanent in matter of fact. They vary considerably with the progressive knowledge and opinions of mankind. Neither politics nor legal ethics are stationary sciences; and different countries differ more than

different ages of the same country are wont to do, in this respect. Some governments license prostitution. This seems to us amazing; and we pity the nation that is so degraded in its morals. On the other hand, we license dram-shops ourselves, and how much better is that? Inns are valuable accommodations, but places for selling ardent spirits by the glass are not. The wonder is, that licenses can be had for such a trade. Unfortunately, every grocer now-a-days can have one. Why not every dry goods man as well? Dram-selling is the common appendage of the grocery business in our large towns. Will public opinion ever redress the evil? It has redressed other evils (at least to some extent) which are neither so mischievous nor so reprehensible. The partially suspended sale of lottery tickets (once a thriving traffic all over the country) is an instance. Lotteries are still lawful, it is true, in some of the states. Will not the good sense of the country put them down entirely? Lottery offices are not so bad perhaps as houses of drunkenness or ill-fame; yet they are bad enough to be excluded from the range of allowed liberty. How can a business be permanently endured which produces nothing, adds nothing to the general mass of wealth or accommodation, but is a fraud in its very scheme; a cheat upon the ignorant and thoughtless, whom it deceives with false hopes, and corrupts with vicious excitements; wasting their time, money, virtue, all at once?

Similar questions may arise hereafter in regard to some occupations which are neither unlawful nor wholly disreputable at present, but of which it is problematical, to say the least, whether the harm they do is not more than the advantages resulting from them can be supposed to outweigh; and this is surely the test by which their title to continued toleration must stand or fall in the end. The trade of *brokers* seems already

marked in some of the states for ultimate proscription.* That of *auctioneers* is also losing ground in public esteem. The age is a thinking one : public opinion is the prevailing power ; and everything connected with the social system must abide the doom to which that power shall at last consign it, for it is virtually the lawmaking power.

As far as possible however, and that is as far as the prevailing sense of what is due to the general welfare permits, the laws allow business of every sort to live if it can ; contenting themselves with watching over and regulating the behaviour of those who practise it, so as to prevent abuses and correct vice on the one hand, and on the other, to secure the largest attainable amount of benefits to the community.

The business employments of mankind, whatever seeming confusion there may be in the pursuit of them, divide naturally into three great branches—namely, that of original production for the supply of raw materials ; that of modifying industry, or secondary production, where raw materials are worked up into new forms and impressed with new qualities, to fit them for use ; and that of exchange dealing, for distributing commodities among individuals according to their respective wants, tastes, and caprices.

To the first of these branches belong farmers, gardeners, shepherds, miners, woodmen, fishermen, and so forth, acting in a sort of partnership with nature for the development of her boundless stores.

The second embraces builders, manufacturers, artists, and some others.

The community of merchants and traders are conspicuous in the third.

* In Maryland (if newspapers tell the truth) the fine for admission to it has been raised to \$1000.

Agricultural pursuits, and others of the class of first production, have always been favourably regarded by the legislative power, though the quietude and seclusion of their habits have kept them from being either much known to the courts, or much in need of their attention. The importance of this line of life is fundamental. The elements both of manufactures and commerce are principally from hence. And there are fewer objections to the business of agriculture in particular than to any others: it is the least liable to perversion, the most healthful and invigorating in its effects upon the persons of men, the most conducive to their growth and establishment in virtue.

Mechanical industry stands next; having this advantage over commerce, that it is strictly productive, adding value to everything it touches. Some mechanical employments are indeed unwholesome; others crowd men into dense and inconvenient masses, fatal often to their morals; of some the products, though valuable in the market, are intrinsically worthless; and of others, even noxious. So that more watchfulness and more discrimination are requisite in the legal oversight of such concerns, than of those connected with the soil. Like farm husbandry, however, they are attended with so little stir and jostling as to be seldom heard of by the tribunals, or named in their literature.

Trade fills a much larger space in that literature. The law of trade is an immense mass by itself. Not that agriculture and the arts are less esteemed, but they give rise to fewer questions, and come less into view. Their ways are private and peaceful, while trade, of all things, forces men into concourse and collision, embroiling them in numberless misunderstandings and litigious strifes.

Trade, let it be borne in mind, is either occasional or habitual; a fact or a calling. Nearly every pursuit has more or

less of exchange dealing incidental to it. The farmer sells his surplus hay and grain, or barbers them for something else that he wants ; and artisans depend so much upon acts of the same kind for turning their products to account, that they are called *tradesmen* in common speech. Even contracts of service, abounding as they do in every walk of life, are but a sort of exchanges, and of the nature of trade ; time, skill, or labour, being the subject of transfer, and wages, fees, or commissions, the price. The learned professions themselves operate in this way. Men who live, as the phrase is, by their wits, live in truth upon what they sell the use of their wits for. Officers of government perform their functions on a policy of the same kind as regards their personal interests. And from hence down to sailors, soldiers, menial servants, and day-drudges, all are dealers in their way ; making over to their employers what alone they have to part with, and receiving subsistence, or the means of it, in return. Trade is a great accommodator. Rich and poor are alike its debtors. The man of fortune can no more feed upon his money than the beggar on his rags. Exchanges are universally necessary.

Unfortunately, every act of trade involves a struggle of opposing interests ; and the contracts that ensue being judged of by the parties to them under the bias of those interests, disputes continually arise that can only be settled by the courts. Whence it has happened that the law of trade is grown to such a bulk, while that of agriculture and the arts has not so much as a name by itself. The *policy* of trade makes a great noise in the world, while the less bustling concerns of the soil and workshop are scarcely heard of. Trading *liberty* is everywhere mooted and contended for, while the labours of the plough and loom go silently on, free without debate, and having a security of freedom in their calm solitude, beyond the power

of artificial regulations to bestow. In a word, the liberty and the policy most liable to exceptions are precisely those that figure largest in the books of jurisprudence.

There is indeed a liberty of trade which the laws are studious to maintain ; but it is not an absolute principle. There is also a policy of trade that may be termed judicial ; but it is not a policy of universal favour, for it discriminates ; showing favour where general interests permit, and imposing burdens and restrictions where those interests call for them. Trade as such *produces nothing*. It is *not necessarily a benefit*. Men may exchange commodities, and neither society nor themselves be the better for it. Everything depends upon the character of the dealing. A useful trade is to be cherished ; a noxious one repressed ; and one that is simply harmless, let alone.

The general rule is one of favour ; and for the obvious reason that trade, as a whole, is largely beneficial to society ; a source of infinite advantages. But it is trade regarded as a *fact*, and not as a *calling*, that the rule chiefly contemplates. For while professional trade may be a good or a bad thing, trade in *fact* is indispensable ; and it is the larger idea besides, to which consequently the attention of the common law (not to speak now of statutes) is mainly directed. The courts lean always towards liberty, and especially business liberty, as their aversion to monopolies, to perpetuities and contingencies in the limitation of estates, to everything that is calculated to trammel and obstruct the free use of property, has shown from the earliest times. In short, it is an established common law principle, that every one is to be allowed to manage his affairs in his own way, with the least possible hindrance where restraint is called for, with none whatever where it can be safely forborne, and with positive favour in all cases of meritorious employment ; so that whether by impeding, by letting alone,

or by cheering men forward in their business, as circumstances dictate, the greatest good upon the whole may be secured in every instance to the country at large.

But it is proper to be more particular, as to the actual economy of the trade laws.

What the common law does in the matter it does cautiously, for the jurisdiction is a delicate one, and slight mistakes might work great mischiefs.

For the most part, instead of watching the citizen's movements with distrust or jealousy, the common law is the champion of his freedom. It has gained for him many a victory over statutes framed to tie up his hands; sometimes snatching a subject of controversy from the very grasp of those statutes, but more usually softening them down (not to say frittering them away) by constructive mitigations. And even when its action is restrictive upon individuals, it yet is so considerate and guarded in its measures that it produces no shock in the public mind, and is not exclaimed against as statutes often are. In truth, the public mind is the very womb of its conception and formation. It were passing strange if the people's own law were not sufficiently tender of their liberty.

The whole doctrine of the subject cannot be gone into now; it is too extensive. Some parts of it bear chiefly on the *enterprise* with which business operations are undertaken; others, upon mere *labour*; others still, upon the *skill* with which labour is performed. Some go to the *good faith of business intercourse*; others, to the *ease of carrying it on*. There are rules of law intended mainly to *accommodate* the people in the transaction of their affairs; giving protection to the *use of capital*; regulating *agencies and partnerships*; securing advantages of the *road, the post, the currency, credit, banking, navigation, insurance*, and the like. The law-merchant is a

tissue of most liberal trade-policy throughout. Its fundamental canon is, freedom and God-speed to every one in the allowed pursuits, with such exceptions only as the general good requires to secure honesty of dealing and prevent monopolies, forestalling, and other abuses detrimental, it may be, to trade itself, and at any rate, to the well-being of the country.

The regulation of business liberty is in truth a principal concern of our common law jurisprudence, as will appear from the mere mention of a portion of its topics.

In the first place, we have the topic of men's *capacity* for business; branching into those of *infancy*, *coverture*, *idiocy*, *lunacy*, and so forth. All men are deemed competent till the contrary appears; and the exceptions, when they occur, are usually designed in mercy to the subjects of them.

Then comes the list of *business personalities*, such as *masters*, *servants*, *principals*, *agents*, *lawyers*, *clients*, *partnerships*, *corporations*, and a hundred more; over all which the law holds its balance as in God's sight, with justice for its first rule, and charity for the next, leaving liberty to expatiate freely over its own rightful territory, but to go no further.

Business securities compose a third class of topics. Among which may be reckoned *liens*, *pledges*, *mortgages*, *deposits*, *guaranties*, *indorsements*, and though last not least, the negative security of *the law against frauds* in their infinitude of shapes. How equitably and wisely these things are provided for, is in general too notorious to call for present illustration.

The *results of business*, forming yet another and almost boundless department (that of *debts and contracts*) must also be passed over with a similar appeal to the knowledge and experience of all, so far as common law polity is still in force, and unjostled by the legislative power. This is properly the home-
stead of that polity, and shows it off to great advantage.

It has happened, however, that very large portions of the general subject have from time to time been drawn by the legislatures of the country into their field of enterprise. In numerous particulars the common law has been pushed aside, and its wary provisions replaced with enactments conceived in a much bolder tone, and which in many cases furnish rules upon points not otherwise regulated at all, the common law leaving men's freedom in those points untouched.

Taking the whole together, the merits of our *statutory* code of business law are not easily weighed. For though it be the masterpiece of the statute-book, all sorts of qualities abound in it; not to mention that the parts are seldom long enough at rest to admit of a deliberate examination.

The objects aimed at have in general been unexceptionable. They have been public objects, politic objects, and objects, for the most part, of sufficient magnitude; being, in a word, *the defence of the country; the support of government; the health, peace, morals, and good order of society; the advancement of agriculture and the arts; above all, and more than all, the husbandry of trade*: as to which last, three things have been attempted—namely, to promote its interests, to withstand its perversions, to scourge and subdue its vices.

The means resorted to for compassing these objects are various, affecting sometimes the citizen's *general liberty*, sometimes *his conduct in particular pursuits*, sometimes *the pursuits themselves*. In one case, *the access to certain callings* is narrowed by requiring a preparatory education, or exacting a fine; again, *the mediums of business* are acted on for purposes of facility or the reverse, as policy is thought to require; and again, there are statutes for regulating *business forms and ceremonies* in their detail.

The defence of the country and the support of government

are political objects. Laws made to secure the former of these must relate, so far as men's liberty can be concerned in them, to the army, navy, or militia systems. As to the army and navy, they have been hitherto recruited by voluntary enlistments, which of course can oppress nobody.

The case of the militia is different. Militia service (in time of peace I mean) is compulsory; and though this be unavoidable, it is not the less an evil for that. The operation of the drill laws is that of a poll tax payable in labour, with some disturbance of men's habits as citizens, and some depravation of their manners. What is the gain? Can you make them soldiers in five days? or between the ages of eighteen and forty-five years (the usual limits) by five days' drill per annum? When war comes, the man of peace may soon be trained to its uses; but till then the thing is hopeless, without a ruinous draught upon his time. And even were it done, the gain, methinks, would ill compensate the loss. Soldiers are much less wanted than good citizens, and when wanted, much easier to provide. Nor is it possible to combine the two characters in their perfection. The citizen sinks inevitably as the soldier rises. And to require that all men shall become soldiers at the cost of being made worse citizens, while the chances are, that not one in a thousand will ever be called upon to strike a blow for his country (not to mention that a month's steady service, when the time of need comes, will do more for his soldierly qualities than the trainings of a whole life upon the present plan) appears, to say the least, unwise. If *citizen soldiers* are to be looked to for the national defence, let us understand the word aright, as indicating a *convertibility* of the peace character into that of the warrior, and not a contemporaneous blending of the two. Is there not a misapprehension abroad in this respect?

At all events, the liberty of the people is apparently too

much interfered with by the militia laws. A military organization ought doubtless to be kept up; but as to skill and discipline (save possibly among officers) these accomplishments may well enough be waited for till the occasion for them shall become more urgent.

In order to the support of government, men are liable to be called upon either for personal service, or pecuniary contribution.

Political offices of note are sufficiently aspired to at all times, and there is no need of forcing men into them. But in the lower walks of public life, of which the honour and emoluments are small, constraint is often necessary to procure the requisite service. To be an overseer of highways or of the poor, a juror, a constable, a sheriff even, or a justice of the peace, is what few persons of character are wont to think desirable. Yet the places must be filled, at whatever inconvenience to individuals. And when it cannot be done without constraint, constraint becomes the law of the general welfare, and is necessary. Nor indeed is the evil much felt or complained of in matter of fact.

Pecuniary exactions, especially when direct in their bearing, are borne perhaps less patiently. To a certain extent, they are in like manner necessary, and the only question is one of limits. The right of the people to have their burdens laid upon them by agents of their own choosing is no clearer than their right to have them graduated by the exact rule of the country's wants. These wants, indeed, must not be calculated too closely. A stingy government is as despicable as a prodigal one is odious. The midway course is the best. And it is a course, I believe, from which American rulers have seldom deviated far.

Next to the question of how much, is that of the subject matter and the distributive assessments of public burdens.

A man may be taxed in various interests, and by various rules. The bearing of a tax may be more particularly upon his person, his liberty, or his property. A capitation tax, having no respect to the measure of his ability to pay, is commonly unequal and unjust. Liberty, as well as property, is a means of payment; but it is an indirect means, and a tax upon its employment is regarded as an indirect tax, both for that reason, and because the burden is apt to be shifted very soon to other shoulders than those upon which it is first laid.

The most serious questions that have arisen in this country on the subject are confined to the legislation of the general government, which has gone upon the scheme of deriving nearly all the supplies of the treasury from import duties, that is, duties upon a particular branch of *business*, to the exemption of *property as such*. Whether this has been done upon principle as the wiser policy, or upon grounds of convenience, as the easier and more popular one, is not quite clear perhaps. Property is certainly apt to rebel against direct impositions. Business takes the burden more quietly, for the very reason that it hopes to relieve itself presently by a sly transfer of the evil to consumption. And consumption offers no resistance to this, because in the eagerness of its appetite for what it feeds on, it looks at price as a whole, and seldom stops to pry into its composition, or see how far it is in fact augmented by ingredients foreign to its nature. Hence the popularity of duty taxes, or customs, compared with most other forms of public exaction. The people prefer, it seems, to have their money taken from them insensibly and without observation, as women use chloroform to escape the pains of teeth drawing.

And yet a doubt may be raised whether the very facility of the duty system be not an argument against it in one point of view. Can it be best for the people that their rulers should be

able to exact upon them so imperceptibly, I had almost said so stealthily? May there not be less economy of expenditure where the cost is so easily made up? And would it not be safer for the country if its vigilance were kept awake to the conduct of its agents in public life by having their demands made known from year to year in undisguised appeals to its property interests?

So far however as complaints are heard, they go not to the system, but to certain practical details of its application. Congress have generally thought right to apportion the tariff of duties in such a manner as not only to protect home industry but to foster some of its branches more than others. This has given rise to partial uneasiness and opposition. The supposed inequality of the consequences, both as between different states, and also in regard to different business callings, has been exclaimed against, and even the constitutional power of government in the matter denied, the silence of the constitution on the precise point being thought to warrant such denial;—as if usage could settle nothing in the way of fundamental law.

The inequality complained of is doubtless real to some extent, and should always be considerably borne in mind; although it has no bearing on the legal aspect of the question, forasmuch as the *object aimed at* in these tariff discriminations, namely, the encouragement of particular lines of industry in preference to others, and of home industry in general as compared with foreign, must be deemed legitimate, supposing it pursued in a truly national spirit for the general good.

The constitution is indeed silent in the matter. It ought to be silent. Points of *policy* belong not to the constitution. They arise under it continually, but have no concern with its structure. Policy is not a power, and requires no delegation of power for the use of it. A grant of *power* to pursue this or

that line of *policy* were absurd. Congress have power to do a host of things, but *how* they are to do them, that is, with what views of policy, is a point of discretion for themselves alone.

The strongest objection that can be brought against our tariff laws (apart from the question of expediency as to taxing liberty rather than property) is *their unsteadiness*. Frequent and abrupt changes in a system of burdens imposed upon business operations, not only put men to great losses, but disconcert their plans, unsettle their views of the future, and drive their liberty itself into straits and corners. A permanent bad tariff is better than one in continual fluctuation, though of an average quality superior to the other. Things will in time adjust themselves to almost any fixed law, but never to a law that is unsettled and fluctuating.

The *public health* is a civil and social concern, with a general bearing that is also political.

The dangers to be guarded against here are contagion, infection, and other causes of physical mischief to individuals and neighbourhoods.

Among the preventive measures resorted to by government, *quarantines* have a conspicuous place. Regulations are also made in some of the states to prevent the unpacking or unloading certain kinds of goods in certain populous places at certain seasons of the year. We have laws moreover (deserving notice in this connexion) to secure the safe loading of boats and ships, the safe construction and management of steam boilers, the use of tiller-chains instead of ropes, the safe landing of passengers by the way, the safe driving of carriages, the ringing of bells at railroad crossings, the employment of pilots in navigating the entrances of harbours, the labelling of poisons by apothecaries, with various other instances of precautionary wisdom ; all proceeding on one principle, and looking to one end—the

general welfare as to life and health. And because they are reasonable means to that end, they infringe no man's just liberty.

For remedies when prevention fails, our reliance is mainly on the two learned faculties of medicine and surgery, which are accordingly cherished by numerous public regulations. Candidates are required to be carefully educated for the business, and are only admitted to practice on the faith of diplomas certifying their attainments in professional knowledge. This is in one view a check to competition, for it encourages merit by the promise of a sort of monopoly privilege, and represses ignorance and quackery at the same time ; for which last, regarded as professional vices, there are penalties also at the common law, if not by statute, in cases of egregious misconduct.

In some of the states, apothecaries too are required to be licensed, by way of security for the delicate responsibilities of their calling.

A portion of the health laws have been much spoken against. Merchants and travellers, it is easy to foresee, will never be reconciled to quarantines ; mountebanks will continue to be indignant at the qualifications put upon the liberty of medical practice ; and I am told there is a class of politicians who almost deem the republic in danger from the aristocracy of professional merit engendered, or at least nursed, by those qualifications. There is no satisfying everybody. Our sanatory code may not be perfect, but I see in it no vicious excess, and no manifest fault of plan.

As to *peace, morals, and order*—topics usually regarded as civil, but which, in a large view of things, concern the state in its vitality—they are so linked together that it is hard to separate them, and not worth while to attempt it. Order is the main thing, so far as human government is concerned ; peace

being a part of order, and morals (with education, its tributary and concomitant) the sustaining element of both.

The common disturbers of these great interests are crimes, misdemeanors, and torts. Concerning which, it may suffice at present to refer generally to the criminal and police codes, and a portion of the code of civil remedies, for the law of the subject.

There are certain practices, however, not amounting to technical crimes, nor even to torts, which have called forth a multitude of statute regulations, adapted variously to circumstances, but in aim and policy nearly uniform, and composing altogether a sort of prudential economy for the repression of a great variety of misdoings, of which some occur chiefly in pursuits of pleasure, and others in those of business. A portion of the voluptuary vices have been mentioned already. Those of a business character are lottery-dealing, stock-jobbing, hawking and peddling, juggleries and public shows, grog-selling, brothel-keeping, and the like.

Now it is from the disorderly nature and tendency of these things that legislatures and judges derive their jurisdiction over them.

The jurisdiction is variously applied. One method is, to make void men's contracts when of vicious origin. This has been practised in regard to stock-jobbing and other wager dealings, tavern accounts, and sabbath-day bargains. Another mode has been, to discourage the production of articles of a hurtful nature, such as ardent spirits, by discriminative taxation. Another still, to exact fines, and bonds of good behaviour, from persons in particular callings, which are not essentially bad, but of bad tendency; as tavern-keepers, brokers, pedlers. Pursuits that cannot be borne with at all, such as lottery-dealing, where its true character is seen, the keeping disorderly houses,

vending indecent books, and the like, are turned over at once to the criminal courts. And finally, there is a large and very interesting class of laws, the apparent design of which is to provide securities for religion and virtue, and advance the cause of popular education, while the incidental effect is universally healthful and antiseptic, alike in reference to business corruptions, the debaucheries of self-indulgence, and the whole catalogue of moral maladies to which society is exposed.

Lottery-dealing is beginning to be duly estimated. It is none the less objectionable because sovereign states have been accustomed to take part in it. A raffle may be unexceptionable in itself considered, when it takes place among gentlemen who perfectly understand their chances. But in the ordinary case, where the general public are appealed to by glaring advertisements of prizes, tempting the cupidity of the common people, who pay their money for tickets under the delusive hope of making their fortunes at once, whereas they are mere dupes and victims, understood to be such by their more wary betrayers; nothing can excuse the procedure. A lottery is among the *crimina falsi*; a cheat, that employs symbols of deception to decoy the credulous; a misdemeanor in its very nature. No man, therefore, has any liberty here. It is absurd to pretend a liberty for cheating the common people.

Stock-jobbing contracts, or the pretended buying and selling of stocks without transfers, with a view to future reckonings on the principle of wager settlements, are, if possible, still worse, in so far especially as men *not of the craft* are drawn into them by sharpers, which is done from day to day in Wall-street, and elsewhere. Such contracts are, in some of the states, declared void by statute; and yet, in the very teeth of the statute, almost every city newspaper has a stock-list notice, in which numbers of them are set forth to all eyes in the very

detail of their terms. The law is a dead letter. The community of brokers, socalled, have a law of their own, which they set up in triumphant contradiction to that of the legislature. Hundreds of individuals are ruined from year to year by the self-legalized gambling of the stock boards; and hundreds more, whose ordinary walks are elsewhere, being occasionally drawn within the vortex of these impudent farotables, suffer as much in principle as in estate from their influence. It is impossible for men to set the laws of the land at nought continually, under any motive, without dilapidation of general morals. Will not the legislature try again, and with a stronger hand, to restrain this monster vice?

From professed showmen and jugglers the country has little to apprehend. The common law is available to repress them in some cases, and there seems not much occasion for statute remedies.

Hawkers and *pedlers* are apt to fancy that their calling is as much a matter of rightful liberty as any other; but there are some objections to it that will be hard to obviate.

First, these men are a sort of vagrants, wandering much further than their characters are known, and against whom the people they deal with have small chance of redress in cases of imposition.

Secondly, the fact that they have no known character to support, is a fearful release of their own minds from the *felt* obligations of truth and honesty. We see this in the whole race of wanderers. The skipper with his crew upon the river, however fair their standing may be at home, are often little better than pirates as they pass rapidly from place to place, along shores occupied by strangers who are not likely to recognize them at a future day.

And lastly, against the certain danger of much evil from the

pedler business, there is nothing to allege in the way of setoff. It is a needless, worthless business, even though it were as fairly conducted as that of stationary traders, which, in general, it of course is not.

The result is plain. The pedler trade is rightfully discouraged by restrictions and burdens. Should the putting an end to it entirely be thought needful to the public good, there would be no oppression in the measure. But it may perhaps suffice to take bonds of good behaviour from those who pursue it, or possibly to license them upon moderate fines paid, with a record of their names and places of residence, to be ascertained by competent proof.

Of *grog-selling*, as of lottery-dealing, I should say it is evil altogether, and in all possible circumstances. And if so, there can be no just liberty for the prosecution of it.

Still it is generally legalized by public license, as fornication is in Paris. And for the most part very small fines are exacted. Should not these fines be increased tenfold, even admitting that the business is to be continued? And for selling without a license the penalty ought to be crushing. Every grog-seller should, moreover, be under special bonds of good behaviour with strong sureties. It is something that tavern accounts be not legally collectable, as they are not at present in New York. But this is a small matter. Perhaps the greatest single corrective that could be applied (short of extermination) would be to separate the grog-selling from the grocery business. The grog-selling grocer is one of the worst of tolerated pests. He is the first corrupter of thousands. Men who would shrink from entering an unqualified groggery, with a sign at the door as such, are relieved of their virtuous scruples when the place of perdition is a tea-and-sugar store.

If the question be, whether party votes might not be lost by

laying hands upon this trade, I have nothing to say; but if it be, whether any man's legitimate liberty would suffer by that means, the answer is easy—liberty cannot suffer where it is not. Men have no liberty for destroying their fellow-men, soul and body together.

Lewdness being a vice of one grade with drunkenness, the trade of catering for it is akin to that of the dram-shop, and the two are said to be often combined. Words fail upon such a subject. What is much worse, the laws fail too, and will continue to do so till the legislature awake to a just sense of their responsibility.

It remains, finally, to speak of those interesting statutes which, like others that have been referred to, may be termed statutes of public order, but of which the aim is to accomplish their conservative design, not so much by acting directly upon the vices of particular avocations, as by upholding the antagonist principles of general virtue, and its helpmeet, popular education.

Statutes of morality are found everywhere. They do not teach the citizen all he ought to do or abstain from, but they insist upon a few primary duties, which no man living attends to faithfully, without being also in a mind to attend measurably to most others: such is the connexion of things. The first table of the moral law (to which those statutes relate) not only precedes the second, but provides essentially for giving effect to it. No better pledge can accordingly be given for a man's fidelity to the just claims of society, than is afforded by his known sensibility to those of his maker. Every day's observation proves it. A truly pious man is always a man of strict relative morals; so that the statutes in question, the scope of which is mainly to uphold a practical reverence for the divine

- name and government, the bible, the sabbath, and the offices of religion, cannot fail, if thus far efficacious, to promote materially the interests of moral order, the great object of their ultimate aim.

We are a christian people, and we are free. Or to express the matter differently, we have a religion abounding in the noblest principles of moral life ; and the prevalence of majority-influences among us imparts the essence of those principles to our civil polity. The laws are consequently christian. Our political and civil institutions are all imbued with christianity in greater or less degree. The legislature for the time being may not, and often do not, express the general mind of the country, but the natural tendency of things is to an ultimate conformity of legislation with the prevailing sentiments of the people. Majority control makes this inevitable.

It thus happens that the sanctity of the sunday sabbath is a first truth in our legal ethics, the written and unwritten laws concurring perfectly in the matter. Men may keep other days holy if they will, but this they have no liberty to keep otherwise, so far at least as outward evidences are concerned. Nor will any peculiarity of private opinion on the subject work an exemption from the general duty. This sabbath is the people's rest, and all must honour it. The national morals are christian.

So the divine name and character, as well in reference to the second and third persons of the Godhead as to the first, is sacred to the legal economy in all its parts. Nor is any human being entitled, under pretence of other views of theological truth, to affront the popular faith by profanities or levities inconsistent with its apprehensions of the divine nature.

In short, the state of things is just what common reason

would have it to be. The morals of a people necessarily agree with their religion; and such as their morals are, their laws, supposing the government free, cannot fail to be ethically the same. The case has no secret about it, which the very simple relation of cause and effect is not sufficient to explain; so that, if any are disposed to find fault with christian ethics as too strait for liberty in their notion of it, and unfit, on that account, to be incorporated with the laws, the inference is plain, that such persons have got into a wrong community; and to realize the ideal of their fond conception, they must seek out a people to reside among, whose character shall be more congenial with their own. In the nature of things there can be no relief for them but this.

I know the constitution is against "establishments of religion," so called. It ought to be, if it were not. The constitutional common law of the particular states (the elder ones at least) tones perfectly with the federal canon on that head. The general mind of the country is made up on the subject, and has been from the beginning.

Well, and what then? Does it follow that there is a doubt about the christianity of our laws and morals? Not till it shall have been proved that those ill-omened "establishments" are christian, or favorable to christianity, which every man of decent intelligence knows they are not.

But let us take a distinction calculated, as I think, to bring the matter to a short issue.

Our religion has two aspects: it is a religion of *principles* on the one hand, and of *church order* on the other. These things may be combined, but they are also separable. And the question is, against which of them in particular is the celebrated prohibition of "establishments" to be regarded as running?

Not surely against the *principles* of christianity ; not against its *spiritual nature* as a religion of faith and duty for the government of men's lives. For in this view of the subject, an establishment, technically speaking, were impossible. The religion of the gospel, thus abstracted from its forms, has neither church nor clergy capable of an outward union with the state. There is no body politic, nor anything that admits of being converted into one. Mere spiritual elements are not the material for a state fabric.

As therefore the constitutional fathers did not mean to enjoin congress against "establishing" what in its own nature was beyond the possibility of being so dealt with, I conclude that christianity, in its great principles of divinity, piety, and morals, that is to say, *general christianity*, is not within the bearing of the prohibitory clause. Strange if it were, but it is not. There was no more cause for guarding against the building up a state church out of such elements, than against mistaking spiritual for solid materials in constructing a capitol for the nation.

Forasmuch, then, as it was not gospel religion that was forbidden to be "established," the prohibition must have had something else for its object, or it was senseless. But what else? A child might answer. What else could it be but some particular form of church order, some visible sect of religionists, whom it was of course possible to prefer to other sects, and to set up as political favorites? Here, indeed, was a tangible subject, that congress might take hold on if permitted. An "establishment" is essentially a preference of one sect over others, and creates a privileged order of men, contrary to the very genius of our politics. As christians the people are substantially agreed: near all of them hold to the bible, and its

outline truths : but as ecclesiastical religionists they are much divided, and it would never do for government to aggravate their dissensions by taking sides with one of the parties against all the rest. We live in a *republic*, where, as the term itself implies, men in office are to use their powers for the people at large, and without favour or partiality. Other nations must do as they please, an "establishment" would not answer in our case. We have seen it tried in England, Scotland, France, and elsewhere, under the strong arm of monarchical empire ; the thing established being always an *ecclesiastical sect*, and never the pure elements of christianity. The popedom itself is but an overgrown "establishment," the curse of the whole earth. And shall we, with our knowledge of the history of these examples, follow them ?

Now order that we have had a fundamental law against it ; a law, as all experience shows, not less in harmony with our religious interests than with the political system of the country. Establishments of the kind referred to are worldly things, with which the gospel has nothing in common ; and they are things of an aristocratical nature, inconsistent with the declaration of independence itself.

As to *agriculture and the arts*, they have had as yet but little done for them, save in general to preserve the liberty of such pursuits in common with others. Here and there a statute of encouragement perhaps ; a privilege bestowed ; a bounty offered ; an act of incorporation or apprenticeship ; with certain checks put upon men's practice in preparing articles for the market—as when the packing of hay or cotton, the weighing and marking of butter firkins, and the like, are provided for ; a few such things are all that can be mentioned to any purpose. I believe however that the difficulty has been to dis-

cover ways and means of serving these important branches of popular industry with effect. A disposition to cherish them has never been wanting.

But trade—trade—has ever been, and is, the great business topic of the laws. A topic far too great to be handled in the space here left for it. Let us give it the prominence of a separate chapter.

CHAPTER V.

LIBERTY OF BUSINESS—TRADE.

For order's sake we may consider first, the competency of individuals as dealers; secondly, the subject matters of their intercourse; thirdly, the rule of business morals by which they are to be governed; and lastly, the prominent features of our legislative policy on the subject.

I. As to men's competency for trading operations, it may be regarded either absolutely or relatively.

In the former view, all are competent who are of lawful age, discovert, and of sound mind. They may be weak-minded, and of a character to be easily imposed upon, but so long as they are neither idiots nor lunatics, they are entitled to act for themselves, and their contracts are in general valid. Of weak minds as distinguished from strong ones the laws know nothing.

When however parties are regarded in their relations to each other, whether these relations be personal, or belong to them as members of particular classes of society, that are understood to differ considerably in business aptitudes, or at least to be of unequal capacities for acts of trade, it is sometimes necessary to be more scrutinizing, and to rescind engagements entered into in these circumstances, if oppressively unequal in their terms. Thus when young heirs are overreached by persons of a more calculating age and character; or the proverbial generosity and incaution of seafaring men is

taken advantage of by landsharks; or wards, just come of age, are reckoned with unduly by their late guardians; or hard bargains are driven by lawyers, doctors, clergymen, and others, with persons under the influence of confiding sentiments towards them; in such cases courts of equity interfere for the relief of the sufferers. Lawyers indeed are not allowed to deal at all with their clients for interests already within the scope of their professional agency. And even though the interests dealt for be not actually in charge for any purpose, there will yet be difficulty in negotiating a purchase; nor indeed can it be done without a measure of communicative and advisory frankness far beyond what is requisite in ordinary transactions of the market. Trustees of every name are under like embarrassment in bargaining for what they have in trust. The mere relation of creditor and debtor, nay of rich and poor, touches sometimes the liberty of trade; for while it humbles and depresses the weaker party, it imposes on the stronger in many instances a duty of forbearance and considerate liberality of treatment not otherwise to be counted on, much less enforced.

II. The subject matters of men's dealings are lands, goods, labour, skill, which are directly valuable; and money, credit, stocks, which are usually to be regarded as representatives of value.

Some things cannot be traded with at all; such as life, health, character, office, political suffrages.

Others admit of a limited use in that way; of which personal liberty is a remarkable instance; for it may be sold, if not directly, yet in effect, under the guise of skill and labour; provided always that it be for periods not too long to leave men's general freedom of action untrammelled. Freedom, as a whole, is to be held sacred from alienation. At the same time, particular interests in it are not only at every one's disposal (as by

contracts of agency and service in various forms) but actually constitute, with a vast portion of mankind, the very capital of business. Indeed this may be said of their security as well as of their liberty; for many services are hazardous.

Some things again, from the comparative difficulty of passing them over from hand to hand, move slowly in the market; the more solemn forms of paper evidence being found necessary, or at least expedient, for effecting transfers. Land is the chief example; though incorporeal hereditaments, for a very obvious reason, class with it in that respect. Goods pass by mere delivery, possession being held sufficient evidence of the right to them. There was an ancient practice of conveying land itself by ostensible delivery; which was done by going on the ground and publishing the act before witnesses. The common assurance of feoffment united a ceremony of that kind with a written declaration of the intent. Feoffments are still possible in most parts of the country, though lately abolished (for what reason it is hard to say) in New York. No doubt the more purely literary usage of our day is less cumbrous, and in most cases preferable. Written evidence is extensively used for the conveyance even of things personal. For the most part, however, the dealer uses such evidence or not at his pleasure; though this option has been greatly narrowed by certain statute regulations borrowed from England under the notion of guarding against frauds and perjuries—with what utility upon the whole, is a point deserving more consideration than it has yet received. The payment of money is the most perfect instance of a chattel transfer. Money is a chattel, as well as a measure and representative of the value of other things; and its circulation is regulated by the law that makes possession and title identical. Of credit and stocks the usual evidence is written; but the facility of transfers is in general such that nothing simpler

or easier could be desired. Mercantile usage would be sure to generate convenient forms for its most ordinary transactions, and the law-merchant is founded mainly on that usage. The great instrument of commerce is the bill of exchange. To which, in its negotiable character, the legislature have conformed what is termed the promissory note. This serves in general for local purposes, and that for more extended operations. Both circulate with nearly the same ease and rapidity as money; delivery, after one endorsement (and before that, if they are made payable to bearer) consummating the title.

III. We now approach a subject of some intricacy. The *rule of business morals* has been much written upon. I wish I could say it has been thoroughly cleared up.

Contracts are the results of previous intercourse between the parties to them; and the great question is, upon what principle should that intercourse be carried on as regards the frankness of communication to be employed in it?—in other words, what tenderness must the parties show to each other's interests while pursuing their own, and thus temper the selfishness of trade with an infusion of justice and charity, such as before God and the laws will make their conduct blameless?

We have seen that no mere difference of degrees in the strength of men's minds is a bar to their encountering each other in the warfare of business. A weak man may be wiser in a particular matter than one who is vastly his superior in other things. Nor can they be in general supposed to know each other's rate of ability well enough (insanity and idiocy apart) to determine when, if at all, they should abstain from business intercourse on that score. They are free therefore to deal together, each with all his powers.

And in so doing there are but two descriptions of wrong which they can well commit:—one, the wrong of misrepresent-

ation, or positive untruth ; the other, that of concealing or keeping back what ought to be disclosed.

Of *positive deception* there is but one opinion among men. It is agreed on all hands, that every intentional and material misleading of a fellow-being by false statements or suggestions, is fraud alike in conscience and in law, and vitiates the result.

So that the wrong we have at present to inquire about is that of *undue reserve*, or *keeping back the truth when in fair dealing it ought to come out*.

This is a kind of indirect fraud :—just as corrupt, and in its effect upon results just as vitiating as any other ; but not so easily detected. It is deception by an *acted* lie, as distinguished from one that is spoken ; the difference being circumstantial only.

If men do not so judge of it in practice, the more is the pity, and the greater the need of a thorough endeavour to enlighten them.

By a strange illusion it appears to be extensively thought, that a wrong perpetrated in a round-about way, and of which the proof is cumulative and difficult as depending on a variety of complicated facts, is less flagitious in proportion as courts of justice are slow in making it out. And thus the moral sense of the wrongdoer becomes darkened and deadened by the very success of his contrivances for obstructing the vision of other people.

But I fear it must be added, that the law itself has something to answer for here, from the too vague and general use it has allowed to be made of its great trading canon *caveat emptor*, or as the current paraphrase runs, *let every one take care of himself*. In principle, no doubt, this canon is a just rule of business for an immense variety of cases. Nay, a necessary rule ; for there could be no sufficient dispatch of busi-

ness without it. But the unlimited axiomatic generality of its terms has led I apprehend to many errors and abuses in practice; some dealers making use of it as an anodyne to their conscientious misgivings, while not a few have had their consciences put to sleep forever by the too frequent repetition of that kind of experiment.

Let two things be borne in mind :—

First, that this celebrated rule is *not of universal application*; and

Next, that it is *not always an unqualified rule, even where it does apply.*

The first position is obvious. Cases in point will occur to every one. Some have been mentioned already. Lawyers cannot deal with their clients on a principle of unyielding selfishness. Trustees and other confidential agents are under like disability in regard to those of whose affairs they are in charge. Wherever there is a relation of parties that makes it the duty of one *to take care of the other's interests*, *caveat emptor* clashes with that duty, and is therefore out of place.

The difficulty lies in the other branch of the subject. Supposing no special relation of parties to exist, and the defiance rule to be obstructed by no general impediment, how are circumstances to limit the use of it; and how are these circumstances to be known? Is it possible to prescribe for them unerringly, so that dealers may know of their existence, and what to do when they arise?

The reference so commonly made in this connexion to the analogies of the Roman jurisprudence, seems to me fruitless. There are things in our own common law system which afford better grounds of argument. Let us look at some of these.

I will confine myself to three particulars. They are first, the course of the equity courts in giving relief against *mistakes*;

secondly, the practice of the same jurisdiction in the matter of *constructive frauds*; and lastly, what has sometimes been considered a peculiar feature of the law of *insurance contracts*, as recognized by all the tribunals legal and equitable, in regard to frankness of communication on the part of persons applying for policies. These things (the list might be enlarged if it were needful) have been sometimes pointed at as a kind of anomalies in our economy; but I hold the doctrine of them to be as broad as that economy itself, and in keeping with every part of it.

It is of the essence of a valid contract that the minds of those concerned in making it come fairly together. In all the special provisions of their dealing this will generally happen, but there is danger that they may blunder at times by silently taking things for granted on one side or the other, which are not true. And if a mistake of fact thus occur, to the material prejudice of a party, it seems reasonable that there should be somewhere a jurisdiction for relief. No proper agreement is in truth arrived at in these circumstances; for a stipulation that does not give effect to the intentions of the party making it, is not his to any purpose of plighted faith or of conscience.

Courts of conscience interfere therefore to relieve a man who has incautiously bound himself to do, to his own hurt, what he had no thought of undertaking.* Nor do I know that any person ever doubted the justice or propriety of the procedure.

It is true, mistakes of law are not so readily dealt with in this way. And there is reason why they should not be. Themselves alone considered, the equity for relief might be as strong perhaps, or nearly so, as in other cases. But against this equity, a rule of policy arises, that must be regarded as outweighing it.

* 1 Ves. Junr., 211; 4 Price Exch. R., 135.

If ignorance of what men ought and are presumed to know were allowed to excuse them from fulfilling their engagements, who shall set bounds to the consequences? Nothing so easy to pretend as such ignorance. And the uncertainty that must attend the proof of the fact (a negative fact, internal to the mind of the party setting it up) would be another difficulty. Yet even a mistake of law may be relieved against where both parties have acted under a common misapprehension (for then the proof will be easier and the danger of the example less) the contract being in truth a surprise upon the intentions of both.*

How much more, if the party who has the best of the bargain, instead of having been ignorant himself, was aware of the other's blunder at the time, and took advantage of it for his own emolument. For then, admitting we have but a mistake of law on one side, with the equity arising from it balanced by a rule of policy forbidding relief; still the new circumstance of an ungenerous advantage taken on the other side—an advantage not achieved by skill in a fair field, but stolen as it were by sordid subtlety; this turns the scale again in favour of the sufferer, and the thief shall give up his prize.

I will add, that a mere bystander, who has nothing to gain by silence, may yet lose by it if practised in reference to a transaction that he is witness to, and which affects property subject to a previously vested claim of his own. A mortgagee, for instance, who connives at the execution of a second mortgage to an innocent money-lender, saying nothing of his own incumbrance, shall be postponed to the new creditor.† A claim of freehold may fare no better in like circumstances. Our tongues are given us for use; and one of the uses they are de-

* Jeremy's Equit. Jurisp. 366.

† 1 P. Williams, 393; 1 Bro. C. C., 357.

signed for by the all-merciful giver is to correct perceived errors among our fellow-men by timely suggestions. Nor can it be right that we should ever act upon a principle at variance with that design, whether we have motives of interest or not for so doing.

Above all things, we may not make a prey of our fellow-men by means of their infirmities or misfortunes. Trade may be cruel, may be ferocious, but the *law* of trade is not so. When I see a traveller wandering from his path, it is my duty to bring him back if I can, and not to avail myself of his known ignorance of the way to compass an object of my own. Not only must I not *lead* him astray, but I must not suffer him *to go* astray, being aware of his ignorance or misapprehension. Conscience tells me this. The golden rule of heaven tells me this. And it is the doctrine of our equity courts upon the subject of mistakes in business affairs.

In the next place, if we look into that numerous and most interesting class of cases which have been decided in equity upon the ground of what is termed *constructive fraud*, in reference to certain improvident bargains made between persons standing in too much disparity of circumstances or condition to leave it probable that they were equally free, and watchful, and considerate, or held each other equally at arm's length, in the negotiation of those bargains; we shall find that the doctrine of the judicial reliefs administered in those cases, is not essentially a different doctrine from the one just spoken of, but the very same under other forms of application. This will be evident on comparing the effect of the disparity here adverted to with that of ignorance, and surprise, and misconception, in bringing men to act upon false premises, and to form mistaken, ill-advised arrangements, such as, with all their wits about them, and with opportunity for judging soberly and intelli-

gently in the matter, they would not make. Whether the inequality of their respective advantages for dealing together have arisen from personal relations subsisting between them, or from differences of age, health, callings, habits, education, and the like, is unimportant; if it have led to false impressions or reliances, and prevented a fair contest of mind with mind in coming to the result; enabling one party cunningly to prey upon the other without seeming to do so; it may be taken, in connexion with consequences, as affording presumptive evidence of over-reaching and undue advantage. For here, as in the case of a relievable mistake, there has plainly been on one side a measure of blindness and misconception (from whatever cause) as to things of importance involved in the dealing; and on the other, a crafty husbanding of the chance thus afforded for purposes of unrighteous gain. The losing party has failed to see the subject in its true light; and he has thus failed, not perhaps by not knowing what he was about in agreeing affirmatively to this or that special provision of his contract, but by resting upon certain unexpressed assumptions calculated to mislead him or put him off his guard; as that the man he dealt with was his friend, and would not let him go astray; or that the property he was parting with was worth no more than it had been forty years before, when he knew the market; or that being old, or sick, or otherwise desponding, his estates were regarded as of small importance to him; or some such like fancies of an infirm dealer's mind: all which the winner, on the other side, has been perfectly aware of, and by keeping adroitly quiet, has sprung his net without betraying the subtlety that decoyed his game into it. Shall he retain his spoil? Equity says no; and it is the answer of the laws.* A con-

* *Gibson v. Jeyes*, 6 Vez. 278. *Bennett v. Wade*, 1 Dick, 84. Hu-

tract, to be legitimately binding, must be made by two minds, and not by one mind striding over the weakness of another in a state of known prostration. It must, in other words, be a thing of *treaty*, not *conquest*.

At the same time, no *mere disparity of results* will in general warrant the forcible undoing of a contract. It is not to be expected that the benefits of business intercourse shall be in every instance the same on both sides. When however the difference is excessive, we naturally look around for something to explain it by. Peradventure some mistake, some surprise, some blinding affection, some overweening confidence, may have prevented the due meeting of mind with mind in what has taken place. And if we find it so, and by evidence to which the oppressor could not have been insensible at the time of the dealing, there is no avoiding the conclusion that the wrong he has done must be righted.

Cases vary to infinitude in their details; and it has not been deemed prudent to mark out beforehand the precise limits beyond which equity will not go with her relieving administrations; but in point of principle the cases are all of a class, being cases of weak, ignorant, inexperienced, thoughtless, dependent, confiding persons, entrapped, or more usually led on to entrap themselves, by men of another stamp. False words are dangerous, and cunning deceivers do not use them. We are left for the most part to spell out the villainy by inference and construction, putting several things together for the purpose; though when fairly brought to light, it is not only of the nature of fraud, but often among the foulest exhibitions of that kind of wickedness. Virtually, such contracts

are obtained through some misapprehension of the losing party, or a degree of imbecility that left him no mind at all for the occasion.

The law of *insurance*, in its remarkable exactions upon the frankness of those who seek to place their property under its protection, rests on similar grounds; only the fraud is here anticipated by a well-defined rule of prevention, cognizable in the law courts; whereas the cases that have just been mentioned are seen (so to speak) from behind, and in an atmosphere of remedial justice more especially proper to courts of conscience; this difference in the points of view, as well as in the jurisdictional mediums of observation, obscuring the identity of principle which yet prevails throughout.

The parties to a contract of insurance are, on one hand, the owner of the subject matter, who knows all about it; and on the other, a stranger, ignorant of its condition, and depending for his means of judging as to the risk he is to take, upon the owner's representations. It is generally thus.

Now I will assume the subject matter to be a ship.

And let us suppose the owner to represent her openly as stanch in all respects. The insurer will of course act upon this as part of his basis of calculation in naming a premium; and consequently, should the representation prove false, the policy will fail with it. Thus far all is plain.

But suppose the vessel really unseaworthy, and the owner says nothing of the matter; what then? Why then the policy will be void, as before. But why? What reason now? Because the insurer, just as in the other case, is misled, deceived. Do you ask, wherein? In this; for that he still assumes, and is known to assume, as of the essence of the dealing, that the ship is sound. And he is warranted in doing so, because such is understood to be the usual fact as to vessels offered for insu-

rance, and it is implied, therefore, in the very application for a policy. So that he who gets insurance on a ship must be regarded as giving his assent and plighting his faith to such an implication concerning her, provided he say nothing to the contrary. And then the failing of the policy will turn, not upon anything mysterious in the law of that species of contracts, but upon the fraud (not the less rank for being indirect and constructive) of the assured party.

The books do not abound in philosophical explanations. They tell us simply, that it is the owner's duty to declare the whole truth, and that if he do not, his policy will be good for nothing. This is stopping short of the mark; for the question instantly arises, whence that duty, as connected with insurance dealings in particular? In other cases there is no such rigour of constrained openness of breast. A man may buy and sell in ordinary with full *caveat emptor* license. Why is one who deals for *insurance* to be singled out and made an exception to the common rule? I will venture to assign a reason. It is not because the applicant for a policy knows what the underwriter does not know about the thing to be insured; but *because he is aware of the underwriter's ignorance and probable misconception of the state that thing is in*; so that to receive his subscription without first setting him right in so essential a matter, would be to take an undue advantage of him; in other words, to defraud him. Uninformed of the truth, it is not for an insurer to *divine* facts of extraordinary hazard; and no such facts being disclosed by the party he is dealing with, and who alone can be supposed capable of revealing them, *he has a right to assume that none exist*. It is the fair assumption; and the assured party, by tacitly assenting to it, makes it his own also for the purposes of the contract, and must take the consequences if it be not true.

We thus see, that the so-called peculiarity of insurance law, concerning the frankness of disclosure due from owners to underwriters, lies not so properly in the law itself as in the uniformly different situations of those parties in regard to the subject matters of their intercourse; the insurer being almost invariably ignorant of the state and circumstances of the thing insured, and bound in charity to regard it as a fit subject of insurance while unadvised that it is not; whereas the owner, having the means of information all in his own hands, cannot but be conscious, that if he gets a policy on a vessel unfit for sea, without disclosing her condition, or by like concealment procures his ship to be underwritten at a low rate of premium when the case is one of great hazard, he is dealing dishonestly, and not only permitting a misapprehension to be acted on which he ought to correct, but conniving at it, and even giving it countenance, for an end entirely selfish and base.

I conclude therefore that the law is general, universal, in the principle referred to, and that wherever a combination of facts arises to put dealers in like attitudes with regard to each other as in cases of insurance transactions, be the subject of their dealing what it may, the rule of insurance-law duty will be found applicable.

We have at any rate three classes of cases ascertained, in which the selfishness of dealers must give way to better motives.

Applications for insurance are one class.

Perceived mistakes of fact, and sometimes even of law, compose another. Men are erring creatures, and their mistakes are a species of misfortunes which it would be monstrous to aggravate by suffering them to be made occasions of scrambling spoliation to surrounding rogues.

The third class is circumstantial in its features, but of easy

comprehension. When one deals with another under great relative weakness or embarrassment, and the influences that depress and paralyze him are of a nature to reveal their presence to the opposite party, they ought in conscience, and they do in equity law, disable the man of power to avail himself of the opportunity thus afforded him for driving an oppressive bargain. The advantage if taken would be undue. It is not more cruel in war to kill a prostrate enemy, than in trade to compass sordid gain by turning the love, deference, trust, or casual imbecility of a fellow-being to his own impoverishment.

Let us see, then, how we stand as to the main question.

Every dealer deals of course for himself, and may lawfully do so. This is well understood.

And it shall be conceded further, that of the intellectual means he works with, namely his knowledge of facts, and his skill and foresight in making use of them, the latter at least are never to be communicated, that is, by constraint of law or conscience. And even facts are things which he has no occasion to read lectures on at large before concluding his negotiations. Men do not trade upon the principle of giving value for value by a settled scale; but rather, of giving less than value, if possible, for what they buy, while for what they sell they are to get more than it is worth to themselves. This is the very motive and design of trade. Nor am I disposed to quarrel with it, taking each man's scale of values to be the secret judgment of his own mind, and which his brethren are as independent of in all respects as he is of theirs. So that no mere bearing of facts upon the point of *value* (the first of all points though it be, in trading operations) can make it necessary to disclose them. A man who is neither bound to sell cheap nor buy dear, cannot, by parity of reason, be bound

to teach others how to contend with him in the matter of prices.

What in special are the facts then, as to class, that must at times be communicated? And what are the occasions that imperatively bid them forth?

We have seen that certain relations of parties operate a complete ejection of the trading proverb from their business intercourse, at least on one side; and that certain perceived embarrassments, affecting the mental competency of a dealer for the time being, will in all cases qualify the use of that proverb in regard to transactions carried on with him.

Now as to the relations that *suspend* the rule of defiance altogether, there is no difficulty in understanding what they are: a single description will always point them out:—they are relations *which bind the conscience of one party to take care of the interests of the other*. Every man who has a conscience knows whether he is thus bound. If he is, he cannot say to the person whose interests he is in charge of, “take care of yourself;” that duty, by the very state of the case, being on his own hands.

But the *qualifications* to which the rule in question is liable, in cases not beyond its scope, arise from causes extensively various, and not so easily generalized.

Suppose the man I deal with seems to me to act foolishly, is that a reason why I should take upon me to instruct him? By no means. I am not his wisdom-keeper. And very possibly, if I knew his views better, I might deem more favorably of his conduct.

Suppose, however, that I trace his seeming folly to a *false assumption in the very basis of his action*; can I then say that my conscience is not touched—particularly if the matter of his misconception be such that he may fairly consider it a

thing in common between us, and contemplated by both in the very same light? Can I wink at an error like this, and take advantage of it too? Does mind meet mind in such a case? Might I not as well take advantage of a fit of natural sleep when it comes over him, to rifle his pockets?

But you will doubt perhaps the likelihood of such a state of things occurring in actual affairs; or if something like it should at times happen, then whether the circumstances can be practically such in point of evidence as to admit of being provided for by the laws with a rule of conduct suited specially to the occasion. We shall see.

Contracts seldom express all that is meant by them. Much is implied. We may accordingly regard them as consisting of two parts:—one embracing *what is openly transacted between the parties*; the other, what they go upon as *mutually though silently understood or assumed*, and which may therefore be considered as a sort of ground-work or basis of procedure, known or supposed by each to be a part of the other's case as well as his own.

Now as far as the actual dealing of the parties goes (supposing them not too unequally matched) they will generally satisfy the claims of legal morality if they make no positive misstatements; whereas the various facts and matters that may be deemed by each of them to be tacitly assumed by the other as well as himself, and so to enter implicitly into the basis in common between them, form the subject of a duty which may be violated by *silence*, or making *no statement at all*. For silence, according to the adage, gives consent. And whatever does this, carries a pledge of faith along with it. To be *privy* to the false assumption of a fellow-dealer, and to go on with the business without setting him right, is virtually to affirm and adopt his error. And this is clearly a moral, as it ought

to be a legal, disqualification for taking advantage of that error.

Can there be a doubt of the validity of the distinction here taken? And if not, the rule of the subject is a very simple one; requiring dealers, in all that they *express*, to say *nothing but the exact truth*—a negative duty; while, as to things which are generally intelligible without words, and may be counted on implicitly as matters of course, they are *to see to it in each other's behalf, that nothing be done upon any tacit misconception*—a duty of positive benevolence towards the party dealt with, though not of optional benevolence, forasmuch as self-respect and common honesty demand the performance of it, and will take no denial.

Try it practically. I am dealing with you in the market. There are two tables of duty before us. *Caveat emptor*, or *take care of yourself*, may be the law of the first, veracity of statement in what I think proper to affirm being all you can require of me; while on the other hand, the law of the second table is more charitable, for it forces me to look to *the implied basis in common between us*, and if I know anything that goes to alter that basis from what I take to be your notion of it, I must tell you all, lest you should really mean one thing and I another by the agreement we make; in which respect, instead of bidding you husband your resources at your peril, I have no alternative but to mete you out a measure from my own, as if to say, "fear me not here; thus far I am obliged to be your guardian, rather than to act exclusively for myself."

Not everything, indeed, which parties intend, and yet omit expressing in their contracts, is to be regarded as common matter of assumption between them. They often intend provisions of a special character, which yet by fault either of recollection or of language they fail adequately to declare. These are not necessarily implied, as of mutual understanding

or intent, unless previously mentioned without objection in the course of the negotiation. For to place a fact in the category of those supposed to be in common between the parties, there must, I own, be *evidence of some kind*, circumstantial or direct, to bring it fairly within their cognizance. It would be hard to put them under obligation to correct each other's views in any case, without good reason for believing that there is need of such correction. The duty can certainly extend no further than there is evidence to guide it.

Now to clear this very serious point of the argument, some length of illustration may be needful.

There is an old familiar maxim of our jurisprudence, and which prevails in other countries too, that gives effect to personal contracts *according to the law of the place (and time) of their concoction*, wherever the parties may chance to be when the period of performance arrives. And courts of justice go the length of saying, that the law of the place is in truth a part of those contracts; as much so as if it were copied out at large and annexed to them or incorporated with them.*

The principle, of course, is too important to be so widely acted on without good reason; and the question is, what reason?

I forbear to notice at present a very general whimsey of the books about international comity, as if this were really the appeasing element for all conflicts of laws as between country and country—the true and only oil upon the waters when disturbances of that sort are abroad. We will reserve such figments for another occasion.

The true account of the matter is this:—the parties to a contract make it always with reference to the laws they are

* Blanchard and Russell, 13 Mass. 1. Mather and Bush, 15 Johns. 233.

under at the place and time of the transaction, unless by fixing on another place in terms for the execution of the contract, that is, by dating it elsewhere or expressing the intent particularly, they evince a different purpose of mind. The laws are the business atmosphere of every locality. Dealers know well, that without laws they deal to no purpose. Laws, therefore, they must have. Either then they act with reference to the local laws, or to those of some foreign place. If the latter, they are wont to declare their purpose specially in that respect; but if the former, they have no cause to say a word upon the subject, their views being indicated by circumstances. A thousand contracts are made with intent to be executed in the place of the dealing, for one that is meant to take effect under a foreign jurisdiction. Whence it happens that *the general habit* is, to date them in the locality of the dealing, and say nothing more as to where they are to be performed. And so far as this habit is pursued, it is unequivocal evidence, that the local economy is tacitly referred to and adopted by the parties.

It must be so. There is a great variety of economies in the world. To which of them is it possible to suppose a reference, if not to the nearest and best known?—the only one indeed which in ninety-nine cases out of a hundred is known at all? Wherever men are, they are amenable to the local laws in everything not expressly reserved to be consummated elsewhere. So that until they declare a purpose of such reservation, we have no choice but to conclude that they are satisfied with their position and intend to abide the rules of it.

Indeed, the very language they employ would often be senseless without the polity of the place and time to explain it. When they speak of pecuniary values, we only know their meaning by adverting to the currency of the country where they dwell. If quantities are mentioned, we turn again to the

weights and measures of the same country to make out the intent. And so of other particulars.

So clear and certain is the evidence of intent to which we owe the rule of interpreting men's dealings by the law of the place and time selected for carrying them on, that everyone feels how unjust it would be to do otherwise; unjust, I mean, to the parties themselves. A note or bond on interest is made, we will suppose, in Boston, where the rate of interest is six per cent. But the creditor, finding his debtor afterwards in New York, where seven is the established rate, arrests him there, and claims seven at his hands. Is that just? or is it a palpable attempt to oppress? On the other hand, if the debtor, knowing the rate of interest in England to be five per cent. only, should change his residence to Liverpool, and insist on interpreting his contract by the English laws; the wrong would then be on his side. In either case alike, the attempted shift would be dishonest, because at variance with the very substance and faith of the dealing that has taken place. Each party knew, or was bound to take for granted, that the Massachusetts rate of interest was in the other's mind when they concluded their arrangement; and that as nothing was then said to displace the idea, it became part of the contract by necessary implication. In other words, it was, distinctly and unequivocally, a part of the assumed basis in common between them; and to which the faith of each was therefore pledged.

Here, then, is an instance in point. Let us try for another.

A man sells a bale of goods or a horse. The buyer knows nothing of *the title* (save the fact of possession) and depends on the seller for that; taking for granted that all is right so long as nothing to the contrary appears. The seller is aware of this ignorance, dependence, and tacit assumption, on the buyer's part; it is the common case of a chattel transfer; the

buyer takes the title on mere assumption as to its sufficiency. Must not the seller be considered as *assenting silently to that assumption*? And if it be false, would it not be a fraud in him to close the sale upon any intent short of agreeing to make the title good? The point is material, and he knows the buyer would have nothing to do with the property but upon the faith of its becoming truly his by the purchase. Had the subject matter been a farm, there would have been means of investigation at the buyer's command, and he would have searched the title out before paying his money; whereas, in buying a chattel, he has no option but to rely upon the seller's faith; being as dependent in that respect, as an insurer is upon the faith of those for whom he underwrites. Accordingly, while the sale of the farm would have involved no necessary warranty of title, the title of the horse, or of the bale of goods, must be answered for by the seller at his peril. He has assented to the buyer's assumption that it is good, and the laws imply a warranty.*

One instance more may be indulged, considering the importance of the conclusion we are aiming at.

It is said, and upon the authority of all the books, that an *insurance contract* is "*eminently a contract of good faith*;" a sort of affluence of faith and honour (*uberrima fides* is the early expression, which has been handed down from generation to generation like an heirloom) being universally claimed for it by way of special distinction. I do not feel the force of this. All contracts should indeed be rich in faith, but not one more than another. Much less does the peculiarity of insurance contracts lie in the degree of faith proper to them. We must look for that peculiarity to the relative situation of the parties,

* 6 Johns. R. 5. 19 id. 77.

and the doctrine of tacit assumption in connexion with it. The applicant for a policy knows, for example, that in regular course of business a vessel must be seaworthy, in order to her being insurable at all ; in other words, that it is out of the question for underwriters to take risks, and of course unusual to be asked to take them, on vessels not of that quality. Seaworthiness, therefore, is a thing they will naturally take for granted, if there be nothing said to raise a doubt of it. They cannot well do otherwise. And when the policy is delivered, it will be on this implied assumption and condition ; which consequently the assured, *as having virtually assented to it*, must make good in all possible events. He knows, by the risk being taken, and by the rate of premium charged, as well as by the general course of business in such cases, that the sufficiency of the vessel for her voyage is a first principle with all insurance dealers, and he knows that his application for a policy would be an outrage, if made in secret disregard of that principle. Forasmuch then as he would expect to be taken for an honest man, so long as nothing appears to the contrary ; on like reason he may be deemed to claim implicitly, that the character of his vessel be also unsuspected till there be something said to throw a shade upon it. And his silence on this head is proof of an undoubted acquiescence in the underwriter's taking the fact for granted as a part of his groundwork, that she is staunch in all respects, and a fit subject for the proposed contract.

Put then these several instances together, and see what they amount to. Do they not each of them afford plain practical evidence of things implied in men's dealings and essential to them, which yet the parties go upon without a syllable of communication to show it ? Further illustrations might be given to the like purpose. There is scarce a business arrangement of any kind effected in the market, but it abounds in correspond-

ing features more or less strongly marked. Whatever it is natural and usual for men to look upon as matter of course, so that to talk about it were seemingly a waste of words, thus much they are always ready to assume without stipulating for it, and their doing so becomes a thing familiar to everyone's observation and experience. The evidence of the practice is flagrant. No dealer can shut his eyes to it. And just as far as it is understood to be generally carried, so far it is a subject of mutual faith between dealer and dealer, and imposes upon them the reciprocal obligation of enlightening each other in its material details, to the utmost of their power. For be it known and remembered, the advantages to be lawfully gained by a trading operation of any sort, must be sought in its *express*, not its *implied* terms; its articles *formally negotiated and declared*, and not the *tacitly assumed facts*, which ~~are~~ ought to be the same to both contracting parties, be the subject of their trade what it may.

Now the breadth of this *basis in common*, this *ground of honour*, where dealers have no alternative, either in law or conscience, but to be fair-minded and unreservedly frank, may be greater or less in particular cases according to circumstances.

Some things are always comprehended in it, if there be no positive suggestion to the contrary. That the local laws are to govern, be the forum ever so distant that may chance to apply them, is an example. That goods sold by a man in possession carry his warranty of title along with them, is another. If sold as provisions, it is also understood that they are in wholesome condition; and if by sample, that they correspond with the sample. When a professional man, or an artist, undertakes a job in his line, a tacit condition is implied, that he has competent skill. A party seeking insurance warrants his vessel to be seaworthy, though he say nothing to the purpose. He en-

gages in like manner for the legality of her intended voyage; that she is not enemy's property, nor employed in any illicit trade; that she is properly documented; in short, that there is no unrevealed fact within his knowledge that can aggravate the risk.

It was once adjudged that what is called a sound price implies a sound or fair quality article; but maturer thought has led to a different conclusion, particularly when the thing sold is accessible for examination; it being deemed more politic, to say the least, that buyers should be put to judge of qualities for themselves, save as to provisions (and perhaps medicines) which, as affecting life and health, and being wanted by everybody, whether competent to judge of them or not, are made the subject of a more cautious rule.

But without further enumeration it may be said in general, that the basis of tacit assumption to which contracting parties must be understood to give their assent, is at the bottom of the whole legal doctrine of *implied warranties and promises*.

And this common ground of silently implicated faith may be enlarged indefinitely by a dealer's *intimating his views* as to anything material that does not naturally belong to it. As if a purchaser of wine should say he understands it to be of a particular vintage, and the seller makes no answer; the fact, if it be of moment, may be insisted on afterwards by the buyer as agreed to; and in case it turn out false, he may claim damages as for a fraud. So if a man inquires for water-rotted hemp, and hemp is thereupon shown and sold to him, without any express statement as to its being water-rotted; the qualification suggested by the terms of the inquiry is fundamental to the dealing. And the like in every instance of a silent acquiescence by one party in what another is clearly seen to ground himself upon. The doctrine is familiar to courts of justice.

There may be difficulty sometimes in applying it, but there can be none in understanding either its equity and good sense, or the necessity of resorting to it often in expounding the imperfect and ever-varying forms of men's business operations.

We thus see what kind of concealment or reserve it is, that *caveat emptor* cannot justify. Men must be self-consistent. Whatever they tacitly admit to each other; whatever belongs fairly to the basis of implied assumption mutually understood to be held in common between them; this they must abide, and it is wrong to keep back any information which if disclosed would go in the least to modify that basis. The principle is universal.

And though the evidence to be acted on in giving sway to the principle is for the most part circumstantial, it is not the less sufficient for that reason. Men are hanged from day to day on circumstantial evidence. Some nicety of judgment may be called for now and then, in detecting the extreme limits where the proverb of defiance is to begin its concessions and submit to qualifying influences. This is likely to happen in cases of dealings that occur between parties of unequal standing and ability for mutual trade, but who yet are not so related as to forbid the trade entirely. Even in those cases, however, the more competent party can generally satisfy his conscience as to whether the man he deals with is reasoning freely, and on the same foundations as himself; or whether from weakness or dependence of mind he only half conceives or misconceives the nature and proper elements of the treaty on foot. Nor will courts of equity be much at a loss, provided all the circumstances of the negotiation are brought to light. And where there is no relationship or personal inequality, neither those concerned nor the tribunals they appeal to can well fail, the facts being known, to see where duty lies. At the very worst, a scrupu-

lous dealer will choose the safe side of a difficulty, and give the benefit of his doubts, if doubts he have, to virtue and humanity.

A great deal has been said and written concerning the right of a trader to go into the market and to buy and sell upon the strength of advices received by him from abroad, but of which the men he deals with are supposed to be ignorant. As far as I know, the problem is unresolved. And yet it seems not very dark. Try it by a single inquiry: *do the advices here referred to touch the basis in common between him and his fellow-dealers?* If they do, he must divulge them, or according to my views he will buy and sell dishonestly, because against the faith tacitly involved in that basis. If they do not, *caveat emptor* may cut deep, but the wound inflicted will not be that of an assassin.

Let us illustrate this.

A man contracts a loan of money in New York for a long period as upon lawful interest. There is of course an implied agreement on both sides to abide the local laws. It is part of the basis. But the borrower, we will suppose, has just learnt by telegraph, that an act has passed at Albany, reducing interest to a six per cent. rate; and he closes the bargain with this knowledge uncommunicated. Is he an honest man, or a rogue? Has he not allowed the lender to act upon a false assumption?—has he not entrapped him by a shameful concealment?

A man obtains insurance on a ship at sea, and with the clause, if you please, of *lost or not lost* in the policy. But he has secret information at the same time, that his vessel has already been wrecked. Can this be justified? Does he not stealthily violate the agreed basis, while yet designing to hold the underwriter to it if he can?

A case of much celebrity arose some years ago at New Orleans. Upon the termination of the last war with England, but before the news of peace had become public, a merchant, getting private information that a treaty had been signed, went forth and purchased cottons to a great amount at the reduced war prices; making a fortune by the operation, supposing his bargains to stand. For a few hours, he was wiser than his neighbours in a single point of matter-of-fact knowledge. He kept the thing to himself and got suddenly rich by it; for *caveat emptor* was adjudged, after long litigation, to excuse the manoeuvre he had practised.

I am free to own my dissent from that judgment.

And I have a short argument for the case that seems to me sufficient. *Was the generally understood condition of the country as to peace and war, an implied and tacitly conceded fact between the buyer and seller of those cottons?* If not I have no more to say; but if it was, the dealing could not be justified.

What then is the evidence? To the public at large, and to the market, it was a time of war. The buyer knew this. He therefore knew, that unless the seller had a most improbable degree of light beyond the general lot, he too was under that impression. It was the impression of the whole city.

And even if we can believe the buyer to have had a single doubt as to the seller's thoughts upon the subject; the naming of a *war price* for the goods, and *to the seller's contentment*, must have put the last shadow of it to flight. So that when that price was talked about and found acceptable, it is not too much to say, the buyer had certain knowledge that he was dealing with a man who laboured under a momentous mistake of fact in the very basis of his calculations. It was a mistake too, in which the deluded party could not help presuming the

other to be of one mind with himself. It was the fair presumption. In a word, the depressing circumstance of a subsisting war, a state of things the most adverse that could be to the cotton trade, was implied in the very terms of the dealing, not only as real, but as bearing with decisive force upon the matter in hand. As if the buyer had said, "*considering that it is a time of war, I can only give you such a price*," and the seller had responded in effect, "*considering that it is a time of war, I must even take the price you offer*." Both ground themselves upon the self-same, all-important fact of the war; the seller, in the simplicity of his heart; the buyer, just to take advantage of the perceived delusion of his victim's mind, to get the property of that victim at a ruinous undervalue.

Let it be observed, the war in question was a *domestic war*. The case was therefore very different from that of a dealer who avails himself of secret information as to the state of a *distant market*, or war among *foreign nations*. Things abroad may occupy the mind of a dealing party or they may not; and those with whom he deals can have nothing better than conjecture as to his views in that respect. There is no certain conclusion to be formed as to his making such things a part of his groundwork, and they have consequently nothing to do with the basis in common. But peace and war *at home* affect everybody, and are part and parcel of everybody's concerns. There is no escaping from their influence. And to business men, particularly traders, they are as day and night to the natural world; each in turn constituting a broad, general, decisive feature in the whole aspect and economy of things.

Even courts of justice take official cognizance of these historical alternations in the state of their own government and

country.* They do this, not by way of leading the general mind, but going along with it in a path of evidence too conspicuously public to admit of becoming better known by proofs.

Why is it that persons dealing together in the market are presumed to refer themselves, as matter of course, to the laws in force around them? We have seen why it is—those laws are *circumstances of the place and time*—notorious, important circumstances. That is the reason doubtless, and it is satisfactory. Well then, may there not be *other* circumstances of the place and time material like the laws, and just as likely to be adverted to and tacitly embraced by men's thoughts when they are dealing in the market? And what hinders but the raging of a domestic national war should be one of these? It is not a thing in a corner; it is not a thing of practical indifference to trade in any form. How can they help taking it into account?

Not to undeceive a fellow-dealer when he is known to be acting under a misconception of fact, is *to connive at his error*. Not to undeceive him when his misconception lies in what he has a right to consider common ground of assumption between us and him, is virtually *to lead him on in that error*. And thus to lead him on, for a purpose of gain to ourselves at his expense, is little better, in my humble logic, than *to add theft to breach of faith*.

Our skill is our own. Our knowledge of the ends, means, and opportunities of trade are all our own. Not even our special information as to facts of any kind is required to be communicated to those we deal with, *save when it touches the basis in common*, or what either may regard as such on fair presumptive evidence.

* 11 Ves. R. 292; 3 Maule. and Selw. 67.

Nor can there be much difficulty in determining the extent of this basis, and of what it really consists in particular instances. Place and time will settle the question as to most of them. Whatever is largely, generally, durably characteristic of the place and time—be it laws, be it usages, be it measures of quantity or value, be it anything of business interest to which the minds of men are thoroughly and habitually awake—will of right be taken for granted by a trader who has heard of nothing to the contrary. And the party he deals with may be said to know that he will do so. Should it therefore happen that a dealer means not to be governed by these circumstances, or has gained advices inconsistent with any of them, he must communicate frankly on the subject, so as to clear the basis in common of all misconception and all differences of views concerning it, before he can honestly go forward. He has no liberty, either in conscience or law, to strike hands with any man upon a footing of tacit assumption known to be unequal. *Caveat emptor* (with some few exceptions) may build superstructures at pleasure, but the foundations of a contract must be laid in truth and honour.*

IV. It remains to speak, finally, of certain statutes of a general nature, by which it has been deemed politic, in most of the states, and with considerable uniformity, to interfere restrictively with men's business liberty in points otherwise indifferent. A few remarks upon what may be regarded as the more prominent of these statutes, is all I shall attempt.

The scope of this branch of our policy is to some extent moral, being to prevent irregular exactions, frauds, perjuries, and the like; but the principles of it have no essential morality in themselves, for if they had, the common law might have sufficed for applying them, without the aid of statutes. Those

* See note A at the end.

principles are rather to be regarded as simply prudential and conservative; and they only become moral by legislative enactment.

Not to enlarge unduly, I shall confine my notices to such particulars as may be thrown into three classes, which I will call *inspection laws*, *price laws*, and *laws of business forms*.

(1.) Statutory inspections are carried much further in some of the states than in others. Anything may be overdone. They are designed partly, as I understand, in favour of trade, and partly to prevent a multitude of very common impositions. In both views, they have generally been well thought of. The great difficulty lies in keeping up an honest execution of them. This has been felt to such a degree in New York, that in the late remodelling of the constitution of that state it has been resolved (with more haste, possibly, than wisdom) to have done with them altogether. There were evils doubtless, and very serious ones, in the preëxisting practice; but amendment was not hopeless, and to shut the door against it forever was a strange expedient.

It is in populous towns chiefly, if anywhere, that inspections are wanted. And they are wanted there, not so much for the benefit of traders in their professional capacity as of the great mass of consumers.

Men in trade may be considered competent to take care of themselves in their respective lines. Dealers in articles which it has been usual to inspect, such as beef and pork, flour and meal, salt, ashes, hops, flax-seed, tobacco, hides, leather, fish-oil, spirits, lumber, staves, heading, and the like—what occasion can there be for coming in aid of their experience and business skill, with brands of authority to mark the quality of such articles? Mechanics and manufacturers, who work up

many of these articles into new forms, are in that respect a species of consumers on a large scale; but as their buying is with intent to sell again after an interval, in order to the greater ultimate profit, they class after all with traders by profession, and need no protection but that of their own vigilance, to keep clear of imposture. Whether trade itself, as regards the credit and circulation of its commodities, might not be forwarded by a judicious application of government inspections, so as to make these worth attending to for that purpose, I will not assume to pronounce. More light may be requisite—the light of long continued and well managed experiments—before deciding on that point.

But trade and traders out of the question, what shall we say of consumers in the ordinary sense of the term?—the general public, who buy from day to day, and from hour to hour, for necessary family use? Is there not something for government to look to here?

The wants of families are many among all classes of society. And they are to be supplied for the most part by small measures at a time; so that the repetition of the demands they occasion is absolutely incessant. Add to this, the majority of persons whom it is found convenient to employ in making purchases for family use are wanting in the age, judgment, or experience, requisite for a discreet exercise of their commission, provided they are to be dealt with upon common principles of merchandizing, and without precautionary securities on the part of the laws. And as the men of the market cannot be insensible to the opportunities thus afforded them for enriching themselves by the safest of all plans of undue advantage, namely, that of wronging every one a little, but none sufficiently to provoke efforts of redress, there is danger surely that the practice of *cheating in details* will be extensively, not to say

generally, pursued. In regard to some commodities, the cheat will be in the quality; as to others, in the quantity; and not a few things will go to the consumer under more or less imposition in both kinds.

Now it is vain to hope that government inspections can correct the evil in any near proportion to its full extent; but may they not do something with decided benefit to the community? A servant is sent for a barrel of flour or a load of wood. How is he to know that the flour he gets is fine, or the wood sufficient in measure? If there be no authoritative inspection in the case, the parties are too unequally circumstanced to deal together with the hope of a fair result.

If it be said that inspections cost money, be it so. That however is scarcely a burden upon trade. The professional dealer will be sure to pass it over to the consumer. The difficulty of getting inspectors to discharge their office with a firm and unwavering integrity, is a much more serious consideration; but if appointments can be made for public and not party reasons, this difficulty too may be overcome.

Upon the whole, the subject is a delicate one to manage, but of vast importance, and deserving the maturest study of the legislative mind.

(2.) As to *price laws*, the walks of business to which they have been chiefly applied are the legal and medical professions, moneylenders, brokers, bakers, stagemen, hackmen, carmen, ferrymen, and a few others.

Why this selection of callings has been made, for a style of treatment evincing so much seeming jealousy and distrust, is clear enough in part.

Staging, ferrying, and the use of hacks and carts in populous towns, must be so treated from the nature of the case. What everybody has frequent occasion for at short notice, and

which is not of consequence enough in particular instances to spend time in chaffering about it, ought surely to be put upon some graduated scale of charges if it can be. A man wishes to travel on a stage route or to cross a ferry. It is desirable that he may be able to step into the coach or boat the moment he comes where they are. If he must stop to bargain for his passage, the time he loses may be more than the whole fare is worth. Besides which, the public might in this way be very unequally dealt with, one man being charged perhaps a dollar for what another would purchase with a dime; and the power of undue exaction that would thus be lodged with a parcel of whippersnappers and other irresponsible agents, might become an intolerable grievance to the community. To prevent the evil altogether is of course beyond hope; but price laws (with a well managed system of licences) may do much to mitigate it.

There is some show of reason for putting bakers, brokers, and moneylenders under a treatment of the same nature.

Everyone must have bread, and often. Everyone has need to send a servant, at times a child, for a loaf. And were it requisite to see in every instance to the weight, quality, and price of the article, the burden would be grievous indeed.

Hence the practice, in many places, of regulating these matters by periodical assizes, or ordinances of authority, with a power of visitation properly lodged for enforcing them. And where this is not done, the public must submit to a good deal of injustice, and even fraud in many cases, to escape the hagglings of a ceaseless bread-traffic. The citizens of New York act thus at the present day. They had an assize law once, but a sickly sentiment of business liberty, and consequent jealousy of healthful control, has deprived them of it; and now they have bread of all weights and qualities at the

pleasure of the bakers, and pay just as much, it may be, for the worst and lightest as for the heaviest and best. Our people are afraid of being governed too much. Of the two, they prefer to be cheated. Unhappily, the ignorant poor are the greatest sufferers.*

Moneydealing itself is a business for which the same morbid kind of sentiment has to some extent claimed, of late years, a like exemption from control, though as yet without success. The statute of usury is very widely condemned. A fact for which I confess I see no sufficient ground.

Money is indeed as universally wanted as bread; and why, it may be asked, should it not be as free a subject of unlimited exaction?

The comparison may be fair enough. At least there is often a very similar urgency of need in the two cases. A merchant has a note to pay in bank, we will suppose. It is two o'clock, and his provision for it is yet to be made. Rather than have his credit blasted, he will give three per cent. a month for the amount. The broker he applies to knows this, and brokers, when possessed of such knowledge, are apt to slip the harness of their calling and turn principals. What is to be done? Will the broker content himself with half per cent. a month when he can get three? In other words, will he gauge his demands by the golden rule, or by the distress of the borrower? Why should he not act his pleasure, say a multitude of reasoners? may he not do what he will with his own?—an argument that applies with the same force exactly to the hackman, the

* I sent to several bakers, on a late occasion, for a loaf from each, to compare the weight and quality. Some of the lighter loaves were better than the rest, but the difference in weight between the lightest and the heaviest was *one and a half pounds to the shilling loaf*!

ferryman, and the vendor of half-weight bread, made of bad flour sweetened with drugs.

God be thanked, the legislatures of the country have not yet let the tigers of the money-market quite loose. The usury laws are much evaded, but they serve, it cannot be doubted, to keep back a flood of mischief and oppression. And if there be warrant for compelling the dairyman to mark the tare of his butter firkins, or the wood-seller to submit his load to measurement, or the stageman to carry passengers at a given rate of fare, there is warrant also for holding usurers in check. It is not enough to say that the victims of usury are voluntarily such. The ancient Germans used voluntarily to sell their bodies into bondage. Usury is an excess, and the readier men are to brave the ruin it entails, the more urgent the reasons for restraint.

It might be well perhaps if brokers' and auctioneers' commissions were regulated universally, like the interest of money, by statute. Why this sort of regulation should be confined, as at present in New York, to one class of brokers (loan-agents) while others, with the whole tribe of auctioneers, are left to charge what they will, is not apparent. Usage, and a sense of character, may keep the more respectable followers of these callings within bounds, but there are numbers who practise great abuses. Should there not be penalties against their being concerned as principals where they profess to act as agents;—against enhancing prices by insidious additions made and collected for their own behoof;—against taking compensation from both buyer and seller, borrower and lender, in the same transaction;—with other suchlike villanies!* At any rate, dealers of this kind must not object to being required to use their privileges (which are special) in the way and under

* There are facts to justify these questions.

the limitations that a due regard of the legislature for the general good may find meet to prescribe.

Even medicine and surgery have no right to complain of having their earnings reasonably graduated by authority, as has been done in some of the states. A man usually calls a physician when he is actually disqualified by sickness for holding a negotiation with him. In which respect it might be worse to leave the price of medical services to the will of the practitioner than to turn over one who wants money and must have it to the tender mercies of the usurer. The patient can neither bargain beforehand with his physician, nor be a competent observer of his doings to judge of their value. The matter ought plainly to be regulated by law.

Nor yet do attorneys suffer any wrong in the mere fact of having their costs thus regulated—a thing which is everywhere done with some rigour. Perhaps they are in general too sharply dealt with by the legislature. An agency that litigates men's quarrels must expect a share of the odium which these naturally exhale. And as the public nature of an attorney's calling pushes everything that is amiss in him into broad view, the faults of the individual redound in most cases to the shame of the profession at large. From these and other causes there is apt to be a bias in the legislative mind against lawyers as such; and frequent efforts are made in some of the states (more particularly of late years) to curb their liberty and reduce their earnings to the lowest possible scale short of breaking up the business. Counsel indeed are left free, but attorneys are hedged in at all points. Nor is this the worst of the matter. The laws that bear upon them are never permanently settled, save when, as sometimes happens, the statute allowances are so contracted that the attorney, being unable to live by them, makes up no costs, and relies upon a

compensation to be derived, like counsel fees, from his own clients.

• All which is wrong. So far as costs are allowed to be recovered from adverse parties, with whom no contract can be made, a fee-bill, as they term it, is necessary. And even as between attorney and client, the technical character and minute detail of many of the services rendered, puts them beyond the client's power of estimation, and they are very properly to be passed upon by a taxing officer with a fee-bill before him. But the subject is too incessantly hammered upon by the legislature. Not only professional liberty suffers by this means, but professional honour too. If abuses occur, punish them; but do not treat a whole community of practitioners as if they were rogues, because there happens to be here and there (as in what line of business is there not?) a rogue among them. Too biting laws produce often the very evil they are meant to repress. Unreasonable impositions upon commerce lead to smuggling; and this perpetual application of the stinting process to a persecuted fee-bill stirs up both avarice and resentment to reaction. Are not attorneys wanted? Abolish the craft then, and let the people litigate for themselves. But if it is expedient to have them, let them be treated with a decent respect for their office, and let the tariff of their costs be settled on a basis at once fair and permanent. Let in short the legislature be at peace with them. And when penal visitations are called for, let courts of justice, which can deal with offenders personally, be the visitors; so that we may have an end of the preposterous practice of punishing whole masses of men for the misdeeds of a few.

(3.) As to the laws of *business forms*, statutes of wills and conveyancing, of frauds and perjuries, of uses and trusts, compose the more interesting portion of them.

To judge of the expediency of such laws, it is necessary to compare the good they do with the evil they inflict. Restraint is always an evil, by itself considered. And the evil is greater in proportion as the restraint is more, and of wider range of bearing. A small restraint, which falls upon everybody, may be regarded as a very serious grievance if attended with no compensating advantages; while on the other hand, be it ever so great and burdensome in its effects upon a few individuals, yet if beneficial to the general public, it must be submitted to as working, on the whole, good rather than evil.

Statutes of *wills* are not the foundation of the right of testamentary alienation. For as that right existed in England prior to the English statute of wills, so its existence in this country has a higher and better origin than can be found for it in our imitative enactments on the subject. The economy of family government, as understood in modern times, requires that men who have property to dispose of should retain it in their control to the very last; in other words, that their last will concerning it should be respected by the laws. Ownership, without a power of conveyance, were indeed a contradiction. And if there be power to the last to convey by deed, why not by will also, which is but another mode of reaching the same end?

But while we owe not our liberty of testamentary disposal to the statute-book, which as to that is merely declarative, neither are we sensibly incommoded by the formularies which the legislature have prescribed for the execution, witnessing, proof, and recording of wills. A will (with some special exceptions) must be in writing, with two or more subscribing witnesses, according to the laws of the different states in which they are to have effect. The objects aimed at here are certainty and facility of proof, prevention of frauds and perjuries, and the putting titles in a permanently accessible state of evidence. Nor

is the tax of an easy ritual too much to pay for such ends, provided the forms, when once settled, can be let alone.

Conveyancing, apart from wills, has been legislated for in the same policy, and suggests in that view similar reflections. The recording of conveyances is highly useful, and even necessary, as regards the investigation of titles; and in order to its being done, they must be first executed, and then proved or acknowledged in some regular manner, be it more or less troublesome to parties concerned; though certainly the best manner, other things being equal, is that which gives least trouble and expense; and I will take upon me to add, that forms long used are generally so much easier than new ones, that it is seldom wise to change them.

In some instances, the legislature, besides preferring and legalizing certain forms, have positively interdicted others.

The legislature of New York have lately abolished feoffments. Why, is not explained.

There are enactments also in most parts of the country against the limiting estates to particular courses of descent in the way of entails. This is for reasons derived partly from the genius of our political institutions, and partly from the supposed interests of trade. Entailments favour aristocracy by the very fact that they withdraw land from mercantile circulation. It is enough to say of them that they are contrary to the free spirit of the common law, which has signalized its hostility to the old entailing system by the most memorable triumph ever achieved judicially over abuses of the legislative power. In truth, the system was by that triumph curtailed of nearly all its harmful capabilities; so that our enactments against it have been passed more in feverish aversion to what it once was, than under any grave pressure of its experienced evils. Even now, entails are often talked of with a kind of reminiscent horror. Let them

pass. They have done us no very grievous wrong, but we are better without them.

Men however have a natural propensity to extend their rights of property, as well in time as in space ; and failing one expedient for perpetuating their dominion over the objects of these rights, they are apt to try others. When entailments began to be defeated in England by the use of common recoveries (a species of action at law) executory limitations were resorted to in their stead. But though these were upheld in equity to a certain extent, their tendency was regarded as at war with common-law principles, being anti-commercial, and less favourable to the welfare of the many than of the few. And such was the force and prevalence of this sentiment, that the tying up estates by executory limitations, became at length restricted to *a life or lives in being* at the time of their creation, with an allowance of twenty-one years more, in case of need, for a term of infancy to expire. Another judicial victory was thus won for the people, not over the statute-book indeed, but over an inconvenient and wrong-headed practice ; and though in a court of equity, it was again substantially a common-law triumph. A life or lives in being, and twenty one years after, seems no very fearful approach to a perpetuity. The English rule becoming settled in this form, it passed from England to America, where it still prevails extensively and with general satisfaction.

But it is not at present universal among us. The legislature of New York have lately tried their hands upon it for the inconsiderable purpose of narrowing the restriction from *a life or lives in being* to *not more than two such lives* ;—an innovation, as it seems to me, scarce worth the trouble it has cost ; for it has led to infinite controversy, destroyed numbers of most reasonable settlements, and made it impossible for a father now, whatever means he may have, to provide for more than

two of his children in the way which of all others he would be likely to think best for the whole of them, how numerous soever.

Perpetuities are indeed bad things. They are things, however, which we had nothing to fear from before. Lives in being do not last always. More or fewer, they soon pass away. And it is surely legislating with a causeless rigour to debar parental affection from giving life estates to any number of offspring by a mode of settlement that should preserve the entire subject of it to the last survivor and his heirs.

As to *statutes of frauds*, (which in this country owe their origin, so far as personal contracts are concerned, to 29 Car. II. c. 3) may it not be questioned whether legislation is the true mode of dealing with a strictly ethical subject in the point of evidence? Fraud is a vice of ever varying forms and aspects. It may be indicated at one time and in one connexion by what in other circumstances would import nothing amiss. To pre-judge the bearings and the force of evidence concerning it, is at least to run the hazard of frequent mistakes and consequent injustice.

Yet such, I take it, is the drift of these statutes. They pre-determine that the want of a written memorandum of agreement in certain cases, or the insertion of a certain kind of reservation in a deed, or the omission of certain ceremonies in the execution of an instrument, is to be proof positive that some wrong and unfair intention is on foot, and so to frustrate the design. Why? Not because these things are *necessarily* evil, but because they are thought to facilitate evil purposes when such exist, and to give occasion sometimes for attempting to consummate them by perjury. And thus the general liberty is straitened upon a policy of embarrassing rogues. Nor is this done, methinks, upon any suggestions of modern wisdom or

experience, but from the example set us by a foreign government, under a vicious prince, two hundred years ago !

At any rate, the matter deserves to be looked into. No man may rightfully perpetrate a fraud ; but every man is naturally free to do, with pure motives, what the statutes in question disallow. Is it needful to curtail this liberty ? Cannot the persons who are truly fraudulent be made to bear the burden of their own offences ? At common law, the visitations of justice are personal and discriminative. Why are fraudulent men excepted from the operation of that usage, and the curse of their sins visited upon the entire community ?

Consider too the litigious consequences of undertaking to deal with such a subject by prospective laws ; a matter of infinite grievance to society, and which judges have often regretted.

But what strikes me as the gravest thought of all, is yet to be mentioned :—it is, that the law of fraud, so far as it is statutory, is *artificial*, and therefore useless to the interests of morals. Nay, it is worse than useless, it is absolutely perverting in its tendency. To tell a man that he will be guilty of a fraud if he insert a power of revocation in a grant of land, or raise a trust for himself by an assignment of goods, or execute a personal mortgage without delivering possession of the mortgaged articles, is at first to talk riddles to him : his common sense can make nothing of it : but repeat the assertion strenuously for a score of years upon the credit of the legislature, and you may at length constrain him to take the fiction for a sort of truth, and he will learn by degrees to think less and less of the turpitude of real offences, as he finds offences of mere form placed by authority upon a level with them. To tell a man whose word is a bond to his conscience, that in certain specified cases it is of no legal force at all without written evidence, is to make him despise the law-making power for a time, and

then perhaps to lay aside his conscience, and adopt the rule of the statute-book as a convenient substitute. To tell a man of honourable principles, who has made a purchase at auction, that he may disown it if he will, because the auctioneer's note of it wants one point of ritual accuracy, is at first, and while his honour is fresh about him, little better than an insult: but tempt him often in this way, and get both his avarice and the laws of the land to join in your attack upon his virtue, and you will by and by bring down his high sentiments, and recast his nature in the statute mould. I have seen it. I have seen merchants of standing and respectability sneak out of their engagements through the loopholes of a ceremonial law, without seeming to be aware that there was any thing disgraceful in the proceeding. Do you ask how this was possible? The law kept them in countenance. What occasion had they for more *honesty* than the law required? They had made contracts to be sure, but there was a tittle of statute form wanting to the evidence, and the law, which did *not* hold them bound, triumphed over the faith that *did*.

In a free use of terms, there are several varieties of fraud statutes, besides those usually referred to under that name. Statutes of *fraudulent conveyancing* so called are of the number. To which may be added certain acts in reference to *chattel mortgages*. Statutes of *uses and trusts*, and of wills, in some of their bearings, belong to the same category. I go not into the details of these very remarkable specimens of our legislation. They are too well known to require it. What I object to is the common characteristic of them all, namely, that they pronounce beforehand upon formal evidences, the true force of which can never be ascertained in advance. Let the wise consider of it.

The English *statute of uses* (27 Hen. VIII. c. 10) like that

of frauds, has been extensively adopted in this country, and as I fear, with little better advantage. It is an act conceived in much the same policy too, if we are to credit what Lord Bacon terms its "most declaring and persuading preamble;" the professed object of it being to counteract "divers and sundry imaginations, subtle inventions, and practices," that were showing themselves at his time in the conveyance of lands "to secret uses," as it was said, whereby "many heirs had been disinherited, the lords had lost their wards, marriages, reliefs, heriots, escheats, and aids *pour faire fitz chevalier; et pour fille marier*; and scantily any persons could be assured of lands by them purchased, or know surely against whom they should use their actions or executions for their rights, titles and duties; also men married had lost their tenancies by the curtesy, women their dowers, and manifest perjuries had been committed; the king's highness had lost the profits and advantages of the lands of persons attainted, and of lands put in feoffment to the use of aliens born, and also the profits of waste for a year and day of felons attainted, and the lords their escheats thereof; and many other inconveniences had happened and were daily increasing." So ran the act's own account of the grievances it was intended to cure.

Of all which grievances it is to be observed, first, that but few of them are of a nature to be even possible in our unfeudal age and country; though we had no statute of uses; secondly, that such of them as might by possibility trouble us need no statute of that sort to guard against them, forasmuch as dower, curtesy, and the rights of creditors and purchasers might be taken care of in a much simpler way; and lastly, that the statute has signally failed of its ostensible purpose both in England and America; having received from the courts a construction which, instead of putting an end to uses, has only given rise to

a new art of conveyancing; foreign to the design of the law-makers, and beyond the utmost reach of their thoughts.

In an advanced and refined stage of civilization, it is natural for many to seek to diversify the qualities of their estates in land; and except so far as there may be reasons of public policy against it, their liberty of doing so is legitimate and ought to be respected. The only ground on which the raising of uses (that is, of beneficial interests in land, apart from the title) can be well objected to, is that of the possible tendency of the practice to occasional abuse in the hands of fraudulent persons. In which respect a statute of uses so called (that is, for enlarging uses into legal estates) is but a kind of supplement to the general statute of frauds, and has all the vices of that species of enactments. If it be said that uses may be drawn out to perpetuity by executory limitations, so may legal estates themselves if not prohibited. This is one answer. And another is, that in both cases alike, the common law barrier of a life or lives in being, with only a term of infancy beyond, shuts out the dreaded mischief entirely.

Desirable as uses are however, and obvious as are the convenient purposes they at times subserve, the legislature of New-York have lately swept them all away by an act of utter abolition.*

What is more, they have extended the sweep of their besom to *trusts* also as distinguished from uses—with a saving only of some three or four cases of indulgence, in which the people's right of property is *reconceded* to them as it were, as William the Norman granted back a portion of the lands of England to his subjects after the usurpations of the Doomsday book had made them all his own.

Strictly speaking, every *use* involves a *trust*, and every *trust*

* R. S. of 1830.

a use; the use being the beneficial interest, and the trust the confidence reposed in the depositary of the title it depends on and is fed and nourished by. But in popular speech, although the two words are sometimes taken interchangeably, there is yet a class of trusts which are not spoken of as uses; being what are called *active trusts*; in which the trustee has an *agency* joined to his fiduciary character, and such as to render him and his duties the prominent object of attention as regards the subjectmatter.

A very few active trusts are still permitted in New-York.

The question is, why are all others abolished? They belonged once to the business liberty of the citizen, and they subserved his convenience, or were thought to do so. For what reason have they been taken away?

Mainly, as I understand, because they were supposed to facilitate frauds against creditors and purchasers; and instead of leaving these frauds to be dealt with by the judges, who might ferret out the merits of particular cases as they should occur, and punish the guilty without confusion or mistake of persons, it has been deemed fit to put a measure of disfranchisement upon the whole community, by way of guarding against the possible misconduct of one in a thousand of their number.

I cannot see the wisdom, or even the political rectitude of this. My rights of property are truly mine, and until something like a public *necessity* appears for depriving me of them, it is wrong to visit that evil upon me. Nor is there any proper jurisdiction in the state for such a purpose. Men may speculate as they will; mere theory can add nothing to jurisdictional power. It remains true forever, that the putting a citizen to causeless privations is a thing for which no warrant can be found in the constitution.

How much fraud has the New-York statute of trusts pre-

vented? Who has seen anything to convince him of its especial utility in that respect?

On the other hand, the evils of it stare us in the face. Consider the litigations it has bred. Consider the judiciously planned wills it has frustrated. Consider the inroad it has made upon the dying parent's liberty of testamentary disposal.

Even the moral influence of this statute is questionable. In the first place, it is partly a statute of frauds, and so a substitution of technical for conscientious ethics. But what I have at present more particularly in view, *it meddles injuriously with the confidences of mankind*. Few things are so desirable as that men should trust one another. And the more the better. Mutual trust is a basis of mutual kindness, from which kindness comes the very nutriment of virtue. Of all the cementing principles of the body politic, *trust* is the most genial, the most prolific of benefits. To stint and starve such a principle; to frown upon it from high places; to plant hedges about it for the express purpose of restraint, cannot be well. Above all, to enact, as the New-York legislature have done, that a man who has received title to an estate, upon trust to hold it for his neighbour who has paid for it, may lawfully violate that trust and hold the property for himself—what is it but to legalize dishonesty, and poison the fountains of the general health? There may not be many who would dare avail themselves of such a license, but the evil of tempting them to it is not trivial.

Surely the confidences of social life should be respected and cherished. Full scope and large encouragement should be given to the cultivation of them. Society is not the simple thing it once was; its interests are vastly extended and complicated; besides its general framework, there are millions of dependencies in the detail of its more ramified structure and

condition, which no legislative eye can take in at a glance. These all must be attended to; and it will be found, if they are, that not three or four only, but innumerable forms of trust are requisite. The statute may say three or four, and may disappoint fond hopes by setting deeds and wills aside which happen to have passed that meagre boundary; but the exigencies of human affairs demand more, and in spite of every impediment and risk, more will be ventured upon. Men *will* trust one another. And to a great extent their trusts will be kept, whether sanctioned by authority or not. It must be so. There is infinite accommodation in it. Some dealings will be more confidential, some less so; but to say that trusts shall be limited to three or four categories, is to quarrel with at once the wishes, the wants, the necessities of mankind.

After all, my object in these animadversions upon our statute policy of trade, is rather to recal the minds of men to a sober review of the subject than to maintain opinions of my own concerning it. We have gone too far, I think, under the lead of English precedents of a bad age. It is time to stop and consider. Our fraud laws, and our laws of uses and trusts so called, take a strong, and an unwelcome hold of the people's business liberties. Is it necessary? That government should please everybody would be unreasonable to expect. But there is one thing which they surely ought to do; they ought, on such topics, to give general satisfaction to those classes of citizens whose opinions are most worth—I mean, the bench and the bar. Have they done it? When a statute touches men's interests, they are like to be wayward in judging of its merits. One person thinks himself aggrieved when his ship is quarantined; another, when his particular calling suffers from a discriminative taxation; another, when the price of what he has to dispose of is graduated by authority; another, when

his stock-jobbing contract is declared null, or his sale of lottery tickets, or of rum, is interfered with; and another, when a contract fails him on the ground of some unobserved nicety of the act against frauds and perjuries, or a deed is frustrated because it has a clause too much or too little, too long or too short, by statute measurement. Each has his complaint to make, according as the shoe pinches in his particular case; and I am free to admit, that his groans are poor evidence against the wisdom of the law he impugns. But when whole ranks of competent judges speak one language on a point of legislative policy, and this without a shadow of interest in the question save as citizens at large, some attention is due to their verdict. And I think I run no hazard in asserting, that neither bench nor bar have ever been impressed with a conviction favourable to what is called the statute of frauds; and that the New-York statute of uses and trusts, so called, is not at this moment satisfactory to one in a hundred of that portion of the people, whose professional studies, experience, and observation, qualify them to pronounce intelligently on the subject.

CHAPTER VI.

LIBERTY OF CONSCIENCE.

THE next form of applied liberty that craves our notice, is one to which the progress of christianity has given a prominence in modern times unknown to former ages. I mean the liberty we have occasion for in our relation to the supreme governor and judge of the world. This relation is the most comprehensive and the most interesting of all. The duties of it are the most urgent, for the sanctions that enforce them are infinite. Here therefore we must not be hindered in our obedience. No tyranny is so unreasonable as that which does violence to the consciences of men.

It is remarkable that a liberty to which the notion of compulsory interference is more abhorrent than to any other, should have fared in the worst possible manner among the governments of christendom from almost the beginning of our era to a recent period. From the fourth to the sixteenth century it was universally trodden under foot. Nor were its wrongs resented, or extensively questioned. The oppressed, with few exceptions, gave the oppressor no trouble. They scarce seemed to know that they suffered unworthily, or had any rights in the case. At most, they founded no claim upon a knowledge of that kind. And when Luther, the first open and successful champion of the rights of conscience, boldly taught the great truth of the mind's absolute title to religious freedom, the world

stood aghast and held its breath for a time, as if in amazement at so strange a dogma—so daring a pretension.

Nor has the brave reformer's lesson been fairly learnt in Europe even yet. Brute force is still in the ascendent. Where but in America are men quite free at this moment in the service of their maker? In England, will you say? England is nobly free in many things, but not I fear in the religion of her people. How can she be, so long as she continues her unnatural league with a *party* in the church? A state of things so unequal in its popular bearings, showing one class of the queen's subjects loaded with honours, privileges and emoluments, from which a much greater number are imperiously excluded; and this difference made for no other reason than that the favoured party are willing to shape their religious observances by a certain mould of state, while others stand conscientiously firm in what they deem the simplicity of the gospel; is not, cannot be freedom. Such at least it would not be in our republican climate. We hold ourselves free upon grounds of a quite opposite character. We have no government favouritism. No sect of christians is put up, and none put down, by political power; none patronized in excess, and none punished with disabilities and privations for their uncourtly stubbornness of conscience. In short, we have no religious establishment. God grant we never may. It is an institution involving as I think the secret of nearly all the religious persecution that the earth has ever been cursed with. It poisons the very fountains of government. What should we say in America if one of our *political* parties were exalted into a legal establishment—all the offices, all the dignities and rewards of public life at their exclusive disposal? Should we be then politically free? An established church is to the spiritual freedom of a country just what such a monster in politics

would be to the equal secular rights of its inhabitants. And when we learn that the governments of christendom have been wont to espouse the interests, passions and quarrels of some one or other ecclesiastical sect in particular, and to set it up a babel church above everything else, the history of religious despotism is accounted for, and most of its atrocities explained.

The actions to which religion naturally prompts are of two kinds: one, the direct offices of piety; the other, a social service equally binding in conscience, equally religious in principle, but having its immediate object in the well being of mankind. What we have occasion to do therefore, under motives of religion, is first, to worship God, and secondly, to keep his known commandments as regards our fellowmen. Against either of these there can be no valid prohibition, no rightful hindrance of any sort.

As to direct worship, the freedom of this country is perhaps as well guarded by the laws as it could be, both the general and particular constitutions concurring in the work of protection; the former, by the clauses against establishments, or church aristocracy, the latter, by numerous very strong assertions of the right of every one to a perfect immunity of conscience in his devotional pursuits. Nor would this right have been less truly and fundamentally legal without a word said upon the subject. No people ever yet gave up a right of that magnitude in forming their political arrangements. They could not if they would. It is not of the category of things that can be parted with. To attempt to get rid of it were violence to the highest of all obligations, and treason to nature herself.

Religious *morals*, as distinguished from piety, are not within the written terms of the constitutional charters. Yet what difference? We can no more put aside this table of duty than

the other. Each rests upon the very same authority, and we are not told that there is any disparity of sanctions in the two cases. A truly religious man may be as conscientious in many of his social performances as in those of devotion itself. One law-giver, one judge, one measure of consequences—and what remains to warrant a difference of regard in practice?

Nor should the laws affect to discriminate where the citizen cannot. Enough for them that his faith guides him, and his conscience impels.

The true question is of another sort; respecting not the direction of the acts a man is prompted to, but the certainty and dignity of his conscientious motives in performing them. Men may be conscientious where it is impossible for the laws to go along with him; or as Lord Bacon has somewhere said, "that may be something in conscience which is nothing in law." The laws proceed by general rules, and mostly according to the dictates of popular reason. Public order cannot be permitted to give way to the caprices of individuals, or even to their plausible peculiarities of opinions and feeling, unless these be such as to challenge, if not the sympathy, yet at least the respect of the majority of minds. We can understand and appreciate the views that make a quaker fearful of the bible oath. He is therefore excused from swearing, and his affirmation is taken instead. The scruples of certain citizens about the lawfulness of capital punishments may entitle them to be forbearingly dealt with on some points of jury duty, and would perhaps be regarded as a sufficient plea to an indictment for refusing the office of sheriff at the people's hands. There are instances of very charitable and humane indulgence shown both by judges and the legislature to particular classes of men, upon grounds of conscience altogether special and extraordinary. And when no rule of morals intervenes, it is better to

carry such indulgences beyond reason than to fall short of it. But if private views run counter to the general mind in a matter of principle, common sense teaches what the result must be. The laws go then with the prevailing sentiment. Order demands it. The genius of free government demands it. Men indeed are not to be forced in their religious *activities*; but there are things in plenty which they may be required at their peril *to refrain from doing*, because incompatible with the economy which a christian people think proper to maintain.

In morals, if nowhere else, the laws must be consistent with themselves. A jew may keep his own sabbath, but he may not desecrate ours. A romanist may bow before an image of the virgin, for we charitably trust his mind is occupied with something better than the seeming object of his veneration; but an act of unequivocal idolatry in the face of the country (if Mr. Locke thought otherwise, I am sorry to have the weight of his name against me) would be a misdemeanor. Even the biblical doctrine of the divine nature may be seriously argued against by unitarians and others, without criminal offence: so important is the liberty of free discussion that it is not deemed prudent to withdraw the most sacred subjects from its range: but the moment argument slides into levity or malice, and the writer or speaker addresses himself to men's passions rather than their understandings, he exposes himself to an indictment for blasphemy, be his personal convictions what they may. Majority opinions govern in such cases. Not only the bonds, but the proprieties and decencies of public order take their legal tone from that of the public mind, without the least regard to individual singularities. If an anabaptist of the primitive type should appear among us, the laws would treat his freaks with very little ceremony. Free as he might be in the repetition of water sacraments, he would scarce find a protecting warrant in

his creed, however devoutly held to, for sallying forth naked as of yore into the highways, a fifth monarchy madman, whom it would be the duty of the civil magistrate to lay hands on at once.

Nor is it phrenzy alone that pushes liberty of conscience into perversion. This is sometimes done from politic considerations. A female citizen of Pennsylvania, pretending conscientious scruples against the christian institute of marriage, resolved to live with a person of the other sex in a more independent way. But it didn't answer. She was prosecuted and punished, her scruples notwithstanding. Perhaps her's was a case of *philosophical* waywardness. In which respect there are women not unknown to fame, that might be referred to as like-minded, though with what resemblance of practical life does not appear. Another case may be mentioned, that is rather of the *cunning* class—unless indeed the imputation of *fatuity* may seem to comport better with the facts. A set of strange religionists applied to the legislature of New-York for an act to excuse them from the duty of militia drills, as being conscientiously averse to bearing arms. The act was passed, letting them off upon a small annual tax of composition, imposed by way of keeping up an appearance of equality between them and other citizens in regard to public burdens. This did not satisfy them, and they came forward again with their misgivings and solicitations, begging to be eased of the pecuniary mulct, lest peradventure, by paying it, they might still be *somehow implicated* in the guilt of war and bloodshed. A strange request certainly, for it asked exemption from one form of taxation in a way amounting to class privilege. Yet it was granted. Whether rightfully or not, is questionable. The pretence of conscientious scruples was either an honest one, or it was used to save money. If the latter, hypocrisy

deserved no such reward. And even though the more charitable presumption were indulged, there is surely an extreme of weakmindedness that should not be answered according to its folly.

The scheme of moral order, which constitutes the true legal range of our religious freedom, and which we may on no account transcend though for religion's sake, deserves to be well considered. The following particulars may serve for a summary.

First, the authenticity of *the bible* is a fixed point in that scheme. In contemplation of law, the bible is the great and only system of religious truth in the world. In proof of which, it is enough to say, that blasphemy against it, or against either of the testaments that compose it, is an indictable misdemeanor.*

Secondly, the scriptural doctrine of *the godhead*, as made up of three mysterious personalities combined essentially in one, is another point equally well settled in law as in theology: for that to blaspheme the Son, or the Spirit, is alike penal as to blaspheme the Father: nor can either the one or the other be lightly spoken of without legal guilt.†

Thirdly, we acknowledge the obligation men are under to *worship* that glorious being; encouraging the erection of christian churches; providing for the incorporation of christian societies; and denouncing punishment against all disturbers of the popular devotions.

Fourthly, the sunday-sabbath is a part of our economy; and the necessity of forbearing worldly labour on every recurrence of that day of general rest, is imperative. The positive duties of the day, being spiritual, cannot be coerced. But as the performance of them is all-important to the state, the state

* 11 Serg. & R., 394.

† 8 Johns., 290.

should minister as far as possible to their just sway over the minds of the people. If it be well to punish men for violating the sabbath, it is well by the same rule of judgment to cherish and honour the piety of such as keep it devoutly. Nor is it easy to overrate the stake the country has in the due observance of the institution. At any rate, no other institution is more thoroughly incorporated with the legal economy.

Finally, as regards the relationship of man to man in society, our jurisprudence runs all its courses by the chart of ethical christianity. So far as moral elements are concerned, the bible is our primary code. Our notions of right, of justice, of decency, purity, propriety, charity, are all biblical. The family institute is of one character at common law and in the gospel. So are the moralities of conventional life throughout. Much even of our theory of republican politics has a gospel basis. De Tocqueville calls our puritan faith "a democratic and republican religion."* Assuredly, the true popular design of government, the right uses of public power, the natural equality of mankind, and many other things of moment in our system, savour strongly of a christian origin. But whether our political order be christian or no, our civil order is so to a certainty.

This order, and the conscientious liberty it secures, may be violated from two quarters, one private, the other public; that, by occasional misconduct on the part of individuals, and this, by the more serious encroachment of political power.

Against private injuries the citizen has protection by the laws of police, by criminal laws, and by the law of jury damages, applied as circumstances happen to require. And this protection is nearly perfect. There is seldom a call upon

* 2 Dem. in Am., 271.

courts or magistrates to make it good, because the call when made is sure of its effect.

It is in truth from government only that any formidable inroads on the religious liberty of the people can well come. And so the fathers evidently thought. The bulwarks of the constitution look all in that direction. It is to congress that the provision against setting up establishments is directed. The local charters are less explicit now than formerly, but at all times they have abounded with declarations in the matter, intelligible only as against the possible incursions of political tyranny. To us, who have lived long without an instance of the kind of wrong that made the early law-givers of the country so jealous of the meddling of government in spiritual things, it seems strange that any safeguards were deemed requisite on that score. But for the baleful influence of church-and-state partnerships during the previous history of the world, they would not have been thought necessary. Those dreadful institutions had been found not only to pervert the minds of public men, but to paralyze the moral sense of whole communities. The very notion of religious freedom had nearly perished from the earth under their influence. Or if a case of exception now and then occurred among individuals, it was only to put the malign efficacy of ecclesiastical fire and sword to new proof. And thus the men who could not be subdued to acquiescing in a reign of moral death, no sooner appeared than they were physically exterminated. Little marvel that the fathers who had witnessed these things, or at least had heard of them from paternal lips, were anxious to gather securities around the vital but then novel axiom, that whatever else was bound, God's service must be free.

This precious freedom, let it never be doubted, is as truly the citizen's right in many of his more prominent social duties,

as in those of the altar itself. Religion is or should be in control everywhere. And as no power on earth can lawfully hinder us from resting on the Lord's day; so neither can any power on earth impose a lawful bar upon the great offices of charity, such as visiting the sick, or feeding and instructing the poor.* What if government should claim our children from us, to be educated, after the Spartan fashion, in public profligacy; must we give them up? Is not the family institute sacred? Despotism may wrest our children from us, but they are ours by God's gift, and we are not only free to train them in his ways, but can in no possible manner be invested with a liberty to do otherwise. The same in other and larger spheres. A man believes it his duty to preach the gospel, and receives the proper commission for his work; can he be lawfully held back? Despotie authority may interpose: Elizabeth of England, and her monster father before her, did not hesitate upon occasion to muzzle the whole ministry of the church: but does any one question the flagitious character of these acts?

I am inclined to distribute the evils that we have cause to think of as within the power of government to inflict on our religious freedom, into three classes.

The first in magnitude, though the last probably in likelihood of occurrence, is the evil of what are called religious establishments. An establishment of this kind has two degrees of mischief; the inequality it introduces among the people, and the tyranny of administration that is sure to follow. A sect may be preferred without being fully established; but every such preference works at least one of the mischiefs here referred to, and gives promise of the other. To make over the control

* There is good authority for saying that even the 'omnipotence' of English legislation is not up to this mark. See *Doot. and Stud.* l. 1, ch. 6.

of public schools to a particular party in the church would be at once an act of sectarian preference and of wrongful discrimination among the masses of the community. To allow the clergy of a particular denomination of christians to draw tithes from men who cannot conscientiously join in their ritual, would be to follow up an undue respect of persons with actual oppression, since conscience would then be taxed for the very reason that it is unyielding and genuine. So the making this or that form of religious profession a test of admissibility to offices in the state, would be objectionable as putting an undeserved discredit upon the pretensions of many, for no better reason than that their virtue is uncourtly enough to prefer its own integrity to the emoluments of office. The political folly of a test law of this nature is indeed equal to its injustice; for if there be honest men in the state, they are the very men whom such a law is likely to exclude from the public service.

Let me not be mistaken. The government of this country is a christian government. If it were not, the moral elements of the country would have been poorly provided for in framing it such as it is. A law therefore, that requires its officers to be *christians*, is not a test law within the objection; for it runs in favour of no sect in particular, and against none; makes no disparity among true citizens, but only keeps the government clear of persons whom the laws would take for exceptions to the general character of the people—a sort of interlopers, unfit, upon the plainest principles, to manage an economy which they hate, for a society with which they are secretly at variance. So that there was no inconsistency in the rejection of tests by those early state constitutions which yet demanded of every newly appointed functionary of political life that he should subscribe a general assent to the christian faith. A christian government should be administered by christian agents. There

can be no illiberality in holding this for a rule. But such a government is not to be seized upon by a *portion* of the people, that is, by a particular sect of christians to the exclusion of the rest, upon mere shibboleth distinctions. This is inequality, and it leads to oppression.

So long as the constitutional barriers remain as they are, we seem in no danger of an establishment, or any near approach to it. The explicit prohibition in the federal constitution, and the anti-test protestations still remaining in numbers of the local charters, put the matter on as sure a footing as could well be devised. In some of the states the people are politically taxed for the support of the gospel ministry; but the great principle of equality is still upheld, as between different sects, by securing to every one the right of having his contributions appropriated to the clergy of his own choice. Indeed that principle itself is a fortress of liberty as well for religion as for other interests; imbedded as it is in our whole constitutional framework. And so long as the people remain true to themselves, their christian freedom is safe from at least one danger, and that apparently the most formidable of all.

But secondly, there is a danger of another sort, and one which, however unattended to by legal or political writers, weighs upon my mind with a force that troubles me. I refer to the incidental but frequent *overlapping of the legislative power upon the moralities of the common law*. There is a very simple truth which many of our lawmakers have yet to learn:—it is, that in essential morals, *the whole ground of legislation is preoccupied*. Not a sovereignty under heaven but is limited here. Why not acknowledge it, and practise the modesty the concession calls for?

Alas, we do not understand the distinction between morals and *policy*, in the use of the legislative function. And not

understanding it we drive our enterprises everywhere, without scruple, like the Roman matron whose father's body was not obstacle enough to stop her chariot wheels. We take upon ourselves to settle moral principles (or at least the application of them) by statute. Is our work effectual? Can we make that right which is wrong, or the converse? Suppose we give the seventh-day baptists leave to desecrate the first-day sabbath—man's law dispensing with and overruling God's. This has been done in one of the states. Suppose we enact a chattel mortgage fraudulent, unless possession go with it; does our fiat make a fraud where the facts do not? A land mortgage executed thus is admitted on all hands to be honest. The possession of land never goes with the mortgage. It is of the essence of the transaction that it shall not. And what difference if the mortgage be upon a chattel? In the nature of things, none at all. In matter of immemorial usage and common law, none at all. But as uncle Toby said of the poor soldier whom a wound had disabled from marching, "nay, but he *shall* march;" so the legislative will is positive in New York, that there *shall* be a difference where no difference is; a fraud where facts prove nothing of the kind; in a word, that chattel mortgages *shall be fraudulent*, if executed as land mortgages are, and even as chattel mortgages always have been from the beginning of time, with great convenience to parties, and with universal approbation. Or take the case of the man who gets title to an estate upon passive trust for another who pays the purchase money. The Revised Statutes of New York tell us the conveyance shall inure to the benefit of the grantee in his own right. Why? The arrangement is of a kind long used by the most upright of men, the courts of equity uphold-ing it as perfectly conscientious. But say the reverend law-makers, *latet anguis in herbâ*; there is corruption under these

fair semblances ; at least there may be ; the thing is possible ; and so, *let it be* a case of corruption whether or no, and let the fiduciary grantee feed his own avarice with the subject of his trust. Yes, corruption by legislative enactment ! A transubstantiation in morals equal to the material one of the Romish faith. Suppose it were enacted in due form that white is black ; would the colour come ? The laws of morals are as fixed as those of nature. Think of the trustbreaker ; what is to justify him ? The statute ? Nay, but there is a statute of God the other way. Trusts must be kept. And since it is as hard to turn black to white as white to black, methinks our Solons might find better employment than attempting either.

I dispute not but the citizen may have his field of conscientious duty *enlarged* by legislation, for that rules of mere policy, when adopted as a part of public order, become moral and affect the moral sense. There is room for these additions to the economy of virtue, provided always that they touch none of the old principles. Still, and not the less, God's ordinances are paramount. What he has done in the lawgiving department it is audacious in human authority to attempt improving upon ; and every instance of that kind of meddling is an assault upon the freedom of the citizen's conscience, which, as it cannot serve two masters, suffers wrong by all human interference with its highest rule of service.

The history of religious persecution is a strange one. Think of edicts of human power to compel the use of certain forms of prayer, or certain modes of priestly costume, in religious worship ! We have not arrived at that pass. Think of burning men at the stake for too entire a reformation from popery ! Here again the outrage is one of other climes. Think of the court of session in Scotland thrusting its profane presence into the congregations of the church, to dictate who

shall be admitted to the table of the Lord, fit or unfit, friends or enemies of the presiding majesty of the place! All these are foreign, but they are not all ancient, atrocities. It is a comfort to know that they are fruits of a tree that has not yet been planted in our soil, and against the importation of which we have stern laws of prohibition.

But let us rejoice with trembling. We have a legislation that owns to no limits, but wanders forth over the entire field of the laws, the common law department of elementary ethics not excepted. Does it comport with our best interests that *any* power should regard itself, or be regarded by the community, as unlimited? The common law is the great arbiter of jurisdictions. Does it not assign limits to all government functions, that of legislation among the rest? The judges take their boundaries confessedly from its map. Executive magistrates of the highest grade do the same. And why not legislators? Yet these make no ado of trenching upon the law that constitutes the very barriers of their power. I deny their right in the matter. Where the common law is doubtful, they may come in aid of it if they will; but where its rules are unequivocal, especially where they are moral too, as taken, in the form of general public sentiment, from the divine economy, to touch the people's common law is to invade their liberty, and that in the nicest of all points, their religion. What occasion for this? If the interference be but to affirm the great principles of our ethics, it is nugatory. And if it be to alter or modify, it is still nugatory, for it can make nothing lawful or unlawful which is naturally otherwise; while in reference to men's conscientious freedom, a grievous wrong is done; they are disturbed, embarrassed, and either led astray, or exposed to punishment for holding fast their virtue.

Lastly, there is such a thing possible as a virtual establish-

ment of *irreligion*, or at least an injurious preference of it, on the part of government. The suggestion may be startling, but there is too much cause for it. Good men have misinterpreted the religious bearing of the federal constitution, and men of another stamp have turned the error to an ill account. It is the natural desire of profane persons to banish piety from their field of action; and as such persons are common in public life, political administrations are apt to be perverted by their influence. Power indeed, like riches, is itself calculated to smother the conscience with worldly cares. It induces religious forgetfulness, if nothing worse; so that men who do not exactly mean to take sides with infidelity, will often be found acting officially as if they did. Mr. Jefferson made a bad use of his opportunity when he refused to give countenance to the suggestion of a national fast day. General Jackson was betrayed by ill-considered reasons into copying the example. Other men, both in federal and state employments, have prostituted the influence of their stations to the purpose of discrediting and discouraging the religion of the country, as if politics had no concern with it, or none but of an adverse character. Much evil has been done in this way. Currency has been given to false notions; piety has been made to hang its head and mourn; ill practices have been started, of which the subsisting sabbath-mails arrangement of the general post-office may stand for an instance. That arrangement deserves to be signalized. It is liable, I think, to two objections:—one, it violates an institution which the laws of the land hold sacred; the other, it gives the monopoly of a whole department of the public service to *unchristian men as a class*; in other words, to men not scrupulous of sabbath-keeping morality. Is this wise in the matter of the first objection? and in reference to the second, is it just? is it equal? Does it square with the liberties

of the constitution? Have not the more religious the people a right to complain of it? The commerce department should be open to the freest competition best upon common principles of business that the country is doubtless paying a premium to maintain at this moment, in consequence of the preference given to religious men as mail-contractors. What is infinite liberty of others is straitened by that preference; and straitened, I am sorry to say, through a medium of pure merit on their part. They entertain the faith which the laws honour. And because they are sincere in it, and cannot put their consciences to sale, they are excluded from a service by which thousands are enriched, and tens of thousands kept in employment, at the expense of the nation.

It is right to add, that congress have been no further implicated in this affair than by refusing to interfere with the practice referred to. It is a thing of executive management; begun, I own, in time of war, when the plea of necessity might perhaps avail; but persevered in now without that reason to justify it, and against the often repeated protestations of the purest men in the country. Do the people's agents at Washington forget the laws of the land? or do they mean distinctly to set them at naught?

CHAPTER VII.

POLITICAL LIBERTY.

Section I.

TOWARDS government, the people stand in two distinct and very different relations:—in one they are sovereigns; in the other, subjects: and they have two branches of political liberty corresponding with these relations.

Government is indeed the last resort of the citizen for the security of all his rights: in which respect they have all a political phase; and he would seem to be a freeman or not for the time being, according as the protection he enjoys from public power and the laws is more or less perfect and complete.

The world however have another, and perhaps a more prudent way of judging of the matter; taking their definition of freedom less from its actual state in the individual who has it, than from its supposed groundwork in the character of the government, as being what is termed a *free government*—in other words, a government that is either carried on directly by the people, or by agents appointed by and responsible to them; forasmuch as nothing but the presence of a controlling popular influence in a state system, and a ceaseless vigilance of popular guardianship over the administration of it, has been found sufficient, during the past history of mankind, to preserve institutions favorable to liberty from perversion and ruin.

Ours is an *agency-government*, and therefore of the kind denominated free. It has been often called a *democracy*, as if the people ruled in it *directly*, which is an error, and one of bad

tendency. It is in theory as remote from pure democracy on the one hand, as from pure monarchy on the other. The fathers called it *republican* ; meaning thereby to give it not simply a description but a name ; and for the very purpose of keeping up this double discrimination. It was no more intended that the people should manage it themselves than that the president alone, or one of his secretaries, should. And yet it was intended to place it under a decisive popular influence and control, by having the agents who were to be its managers appointed by the general voice of the country for short terms ; re-eligible afterwards indeed, but only upon condition of their being still acceptable to the people, who were to reappoint or dismiss them at pleasure by a new expression of the same general voice.

It will be well if we discriminate as the fathers did. There is danger that we may not. The subject is too much declaimed upon to leave the lines of exact truth always visible. The people are often told without reserve, not only that they are sovereigns, but that their sovereignty is unlimited and unqualified. The assertion may be true in a vague sense, but to a legal ear it is eminently false. There are several lights to try it in. The people, in one view of things, are above the constitution itself ; for they can pull down the glorious structure if they will, and either rebuild it afterwards, or leave it in ruins. This however is not legal sovereignty. In another view, the people are above, not the constitution, but the government organized under it ; forasmuch as they are the acknowledged proprietaries of the system, the parties in interest to whom everything belongs, and whose welfare is to be consulted in all measures of administration. But neither is this the kind of sovereignty with which the laws are technically conversant ; being a sovereignty of position and estate, rather than of active control ; of circumstantial predominance, than of exerted authority.

Let us be more exact. The people's sovereignty under the constitution is a power *in* the government as well as over it; a power which the constitution recognizes and makes use of for its own ends in the established organism of the state; giving it work to do, and in a fixed, unalterable line of action;—in short, a *strictly functionary power*; as much so as the power of the judges of the supreme court.

It follows that this sovereignty, besides being of a qualified nature, is also limited in extent. Nor is the measure of it hard to take; being just what remains of the whole mass of functionary powers legitimately organic to our system, after deducting therefrom the powers devolved upon government agents as such, for the performance of their duties. The result is plain enough. Those devolved powers are all administrative; appertaining to government in the common meaning of the term—in other words, to the legislative, executive, and judicial departments, familiar to every one's knowledge. Such is the *subtrahend* of the problem. What then must the people's *remainder* be? What but the organizing and visitatorial power of the ballot-box?—*the electoral sovereignty*? Nothing less, nothing more.

Nor is this sovereignty *original* in the people. No functionary power can be older than the organism it belongs to. Much is said about the reserved rights of the people, and in a connexion to show that rights of power are meant. It is a delusion. How could rights of any sort, bearing solely on the government, exist before the government itself? And if they did not preexist, how could they be *reserved* when the government was formed? They necessarily took their date from that period. They were the very creatures of the constitution. And it was by the constitution that they were imparted originally to the popular electors. The right of voting at political elections is truly

what it has been called, a *franchise*—an emanation of power from the national fountain head, descending thence upon the individuals who are entrusted with the use of it. To talk of a reserved *franchise* would be a solecism.

Besides, if this electoral sovereignty had been a thing of original right in the people antecedent to the constitution, it would belong to every one—man, woman, and child—so far at least as there is no lack of discretion for attending to its duties; whereas we do not find it so vested; only a portion—not a third part probably, nor yet a fourth, of the whole community, being legal voters; women and minors having none of it, many adult free citizens having none of it, for want of the requisite qualifications of residence, property, tax-paying, and the like. How is this? Are these unvoting citizens disfranchised by the constitution? Is it not more sensible to say, that every franchise being a trust, or at least involving one, the right of voting has been given to such only of the people as are deemed fit and competent trustees of so important a power, and likely to use it with advantage to the country? So that instead of taking away anything from three fourths of the community in that respect, the constitution simply imparts to the remaining fourth a right of its own creation, which was never theirs before.*

And this is done, let me add, not for their sakes in particular who receive the grant, but for the equal good of all without distinction or difference. There is no peculiar value in the privilege of depositing ballots in a box, the act alone considered; nor have they to whom the privilege is not conceded any serious cause of present unhappiness on that account. The only ques-

* It will be seen that I use the term constitution, not simply for the federal charter but for the whole composite system of the country, which, with all its multiplicity of parts, is nationally one.

tion of interest for them, as for others, is upon the likelihood of results to the country. Is the right of suffrage distributed widely enough among the people, on the one hand, to make our elections duly popular in the spirit of them ; and restrained, on the other, to a number sufficiently small and select to render it probable that they will be conducted with proper intelligence and prudence ; so that upon the whole, the true advantages designed by this part of the constitutional arrangement may be fairly hoped for from its operation ? That is the point of true interest, and the only one.

Now the *liberty* that waits upon a functionary power, can of course be no larger than the power is. The people, in their capacity of electors, may do everything necessary to the complete and effectual exercise of the franchise. They must not be hindered in this. No military, no political, no private interference can be tolerated. It is a point of unquestionable sovereignty, and must be treated accordingly.

At the same time, it will become the electors to see to it that they do not overstep their province. To attempt more than the precise nature of the franchise warrants, is usurpation.

And this enables us to condemn without reserve an opinion strangely prevalent in some parts of the country, to the effect that when a man is chosen to an office, especially an office of legislation, it is the right of his constituents to have pledges from him as to the measures he will advocate or oppose in public life ; and even to come upon him afterwards during his term, with dictatorial instructions on the subject. Nor are the holders of this opinion so inconsiderable either in name or influence as to allow of its being passed over in contemptuous silence.

Upon what then do these gentlemen ground themselves ? The notion seems to be, that an election is a *delegation of*

power ; and so, that a pledge exacted from the candidate is but a condition annexed to a free gift ; in other words, that the electors being the donors of the power with which the man of their choice becomes thereupon endowed, have a natural right to be served with it in the way they think best.

But here is certainly a misconception. The electors confer no power, not a particle. How can they ? They have none to confer. Had they the power themselves, they could exert it ; otherwise it would not be power. As then they have it not, they cannot delegate or pass it over to another. Suppose the elected officer should die suddenly, and a vacancy happen ; would his power fall back upon the electors' hands ? No ; for again they could make no use of it, and to them it would not be power. Their right of suffrage would indeed revive ; another *congé d'élire* from the constitution would put them in further action as its functionaries for appointing a successor. This done, their work is ended till new casualties make new room for it. But suppose, instead of dying, the officer plays truant, and is guilty of malversation ; can his constituents intrude upon him and amend his doings ? No ; culprit though he be, the office, so long as he continues in it, is his, not theirs. When his term is up, to be sure, he may be called by them to a species of account. But even that will not be in the way of jurisdictional review, for they can do nothing, absolutely nothing, with the function he may have abused. They are not rulers, but electors only. They can touch the *man*, should he ask a renewal of their confidence ; they can refuse to trust him again ; and this is all the penalty they can inflict.

If then the power of a public agent is not given him by his elective constituents, whence, you will ask, does he get it ? I answer, from the constitution. It is laid up there in waiting for him, against the day of his appointment. The electors

choose him, designate him, give him their letter of approval; the constitution does the rest.

A member of the lower house of congress is elected; we will suppose, by the qualified voters of Albany or Ontario in the state of New York. He is called the representative of his district. A representative *from* it would be stricter language. For though he truly represents his own district, that is but a fraction of his representative character, since he stands in just the same relation to every other part of the country. Is this doubted? How then does he get to be a *national* legislator? Can a handful of local electors make him such by their unassisted action? Can they give him a sovereign lawmaking power over twenty millions of people?

The *duties* of the office are as broad as its authority. However obscurely local his appointment may have been, he becomes at once *a servant of the commonwealth*; voting as freely, and under the very same obligation to vote wisely and properly, for a custom-house at Portsmouth or Mobile; for a breakwater in the Chesapeake; for a railroad, it may be, to Oregon; as for a mole in Buffalo harbour in his own state. His trust, like his power, is that of a legislator at large for the union. Who imposes that trust? Could the voice of Ontario or Albany do it, as the lawyers say, *per se*?

Let not forms deceive us. Let not the idioms of political declamation deceive us. Representatives have indeed their several local constituencies to which they *seem* to be indebted for everything. The suffrages they receive are all local. Of course the gratitude inspired by these suffrages has a corresponding locality of bearing. Circumstances thus combine to shut the constitution out of view, and to make men forgetful that there is a special reason of state for ordering matters as they are in fact regulated, in this momentous branch of our con-

cerns. Let but that reason be considered, and it will put another face upon the subject. In a wide country like ours, distributive elections must be resorted to for filling offices as numerous as those by which our legislation is carried on; and this, not to make the character of results at all different from what it would otherwise be, but just for convenience sake. It is because the people cannot well act in mass and fill those offices by a general ticket so called, that the business has been economically parcelled out among a multitude of territorial districts, each voting for one or more candidates according to the measure of its population, and taking no concern in the election of the rest; the same end being thus secured with ease through the separate action of several hundred communities, which it would be so difficult to reach intelligently by a combined movement. What better expedient could be hit upon? Organization is the point. The public must have legislative officers. How best to choose them is the problem. Two modes offer:—a general ticket for the whole land, or a host of tickets in detail for all the parts of it. Were the general ticket scheme adopted, and the entire body of the people put to vote for every officer in the list, one consequence must certainly follow—the successful candidates would be admitted on all hands to be national agents, national representatives; and the absurdity of holding them to be servants of particular districts in special, or liable to dictation from particular groups of electors, would have no advocates. But it seems the other mode has been preferred; and so the public service is to be provided for by the selfsame people, acting not in mass but in a vast number of subdivisions. No difference of policy or object. National officers are still the thing wanted. And they are wanted for the identical places and employments as before. What difference then in nationality of results? The people act in separate companies, but they all act (so far as they

are qualified electors) and with a common purpose, namely, to officer the government. In one respect they may in fair construction be regarded as cooperating in every part of the work; for the arrangement is theirs by which the forms of the proceeding have been adjusted; being the arrangement of the constitution itself.

Will it be said that *senators*, from the peculiarity of their being appointed by the state legislatures and not by popular suffrage, are beyond the scope of this reasoning?—and consequently, that they may be regarded as representing their respective states, or state governments, more strictly and closely than they do the country at large? Let us try this.

That the state legislatures have any *original* authority for appointing national senators, will hardly be pretended. They get their power then from the constitution. But who made the constitution? ‘We the people,’ is its own emphatic response. Touching the matter in hand therefore, the constitution is a letter of attorney from the entire country, giving to each of the state legislatures upon trust, an elective franchise for filling two places in the national senate. It is indeed a franchise, and like every other franchise has a trust annexed to it. Do you ask, for whose benefit? That of the donor certainly, the entire republic. And thus the state legislatures are the fiduciary agents of the union for appointing union senators. It comes to that, and you can make no more of it.

These senators again are agents—but of whom? Are they the agents of the agency-legislatures that appoint them, or of the real principals in the whole business, the American people? How can trustees of a franchise, more than of anything else, claim the fruit of it to themselves?*

* It is alike curious, strange, and mortifying, that so wise a man as

Viewed in one light, a public officer is a product of the joint action of his immediate constituents and the country at large; the *office* (without which the man were nothing) having its existence by the constitutional enactment of the nation, while the *man* (without whom the office would exist in vain) is furnished by the local electors. But because the more extensively popular part of the work is antecedent to the other in order of time, being the effect of a transaction long since past, and seemingly forgotten by many, there is danger lest the noisier and more bustling performance of the hour, however small the theatre it is done upon, however few the actors, may have an undue relative magnitude ascribed to it. Men should ask themselves a question or two. What is it to provide an *office*, as compared with the *incumbent* of the office? And especially, in reference to the jurisdiction and the power which the incumbent is to be put in charge of, does that come by the office, or by the man? Is it appurtenant or in gross?—a power, in other words, which the man finds in his station when he gets there, or which he carries thither in his pocket with his credentials of election.

Let the subject be fairly dealt with. An electoral appointment has no creative energy save only as regards the connexion of the candidate with the post to which it advances him. His services it of course destines to a new employment. And that is all it does. The line of employment, the office, is a thing of earlier date, and which cannot be touched. Its settled preexistence is indeed implied in the very act of providing an incumbent for it.

If then we can analyse this fixture of the constitution called *office*, and see what its ingredients are, we may arrive at some

John Quincy Adams should have been guilty of the blunder of regarding federal senators as representing the respective *state legislatures*! (See his 'Jubilee' oration.)

conclusion as to what a public man possesses, which his constituents have not given him, and over which there can of course be no right of control left behind in the legislature or the district where he was elected.

The task is easy. Office, wherever it exists, and whatever be the ends it is to answer, is essentially a compound of *duty* and *power* :—the duty of fulfilling its functionary intent (for it is always functionary) and the power requisite for that purpose. This power and duty therefore have, in every possible case, their origin and measure from the constituents of the *office*, and not of the officer who fills it for the time being. Which is just equivalent to saying (when the office is national) that they are national, and not in any sense or degree amenable to the dictation of local electors.

The consequences of a different conclusion would be monstrous. Imagine them. Conceive the president and senate undertaking to overrule the freedom of the judges, on pretence of being their immediate constituents. Yet what better right have the state legislatures to put trammels upon union senators? If there be an argument founded on the notion of *constituency* to justify this, it will justify that also. Conceive a board of presidential electors, assembling after their true function has been exercised and spent, to instruct the political executive how to bear himself in his high walk of state. Why not? What hinders but the same argument is still valid? If suffrage be *essentially* a delegation of power, these absurdities will have to be borne with. If the electoral authors of men's official preferences are the creators of the powers and duties also which their offices imply, government can no longer be government in any national sense; for the administrative sovereignty, as well as that of the polls, will be in the local electorships, and the affairs of the country will be carried on by territorial

districts, and through diplomatic, rather than governing agencies.

How can men lose sight as they do of that great act of general and original sovereignty, the constitution? and how can they shut their eyes to the very genius of the system thereby instituted?

The best frame of government for any given country is that which provides best, first, for the rights and interests of the people, and secondly, for its own healthful continuance. Distinct as these objects may appear, they are closely allied, and they are both vital.

Each however, let it be borne in mind, has exigencies of its own to be separately looked after by the founders of states. To combine the two successfully, is perhaps the noblest, because the most extensively beneficial achievement, that human wisdom can aim at. In the construction of most governments, no effort has been made in that direction. I know of none but ours in which the thing has been seriously attempted.

Mark then the most interesting peculiarity of our system; and God be praised, the most hopeful. Our constitutional fathers were not more considerate for themselves than for those who should come after them. They held their own liberty sufficiently dear; but they were at the same time true parents, and held the liberty and well-being of their children in equal esteem. What did they do? Alike careful of the future as of the present; of the remainder in fee as of the life estate; they made signal provision for both the one and the other of these objects, by placing each in charge of a distinct portion of the sovereign power; giving the law-making and law-executing management of things to a set of persons who were to be specially selected for the purpose with a close regard to

character and fitness ; while the conservative oversight of this agency-corps of rulers, with a view to saving the republic harmless in their hands, was given to an immense mass of popular electors—too many to be capable of united treachery, and yet not numerous enough to include the dregs of society, who might be deemed unworthy of the trust. Such is our scheme. The directly governing sovereignty belongs to public rulers for the time being ; an independent, ultimate power of administration in their hands. But because all power of that kind is corrupting and dangerous, these rulers, sovereign though they be, are held in check by regulations making it necessary for them to appear from time to time before the people and have their commissions renewed, or to give up their places altogether and descend to private life. So that the electoral sovereignty, to which the enormous power of public opinion appertains, or is at least subservient, has *influentially* the paramount control of everything, as in truth it ought to have, though for any purpose of direct action, it is simply co-ordinate with that of governing agents ; a power in the government like theirs ; and no more free to trespass upon them, than they are to invade its own domain.

The constitutions of the particular states exhibit the same complex economy in this respect, which is so remarkable in that of the union. They are repetitions on a smaller scale. Indeed, our very counties and townships—all our territorial governments, are constituted on this model. Wherever power exists, and is ultimate, or exempt from jurisdictional appeal, it is sovereign in its nature. National sovereignty resides of course in the union alone. State sovereignty is a thing of much humbler attributes,*but it is alike real ; and so is county sovereignty. There is ultimate power in every county board of supervisors, every village board of trustees. And from the

national hill-top to the lowest jurisdictional valley of the land, all the way down as you descend, you have sovereignty in two distinct forms ; one for administrative measures ; the other for looking after the agencies on which these measures depend : it is the grand characteristic feature of our polity throughout.

In a pure democracy the sovereign authority is not divided at all : much less is it economically distributed as with us, for business purposes on the one hand, and for purposes of conservation on the other. It consists of all manner of powers huddled together and shut up in the breast of the body-politic, like the winds in the cave of *Æolus*—chafing, turbulent, ever struggling to break forth, no matter in what direction, no matter with what desolating consequences.

The case of pure monarchy is different, and yet like. There too the sovereignty is undivided and unchecked ; but it acts with more deliberation whether for good or for evil ; being under the direction of one will, instead of millions ; less prone to vague extravagance ; less wayward, and withal less blundering, in the prosecution of its aims. If it can be said that there is any conservative principle in such a government, it is only the sinister one by which the prince, while administering the affairs of the state for his own pleasure and emolument, endeavours to perpetuate his advantages, with just so much regard to the condition of the people as the policy of permanent self-aggrandizement prompts.

Even a mixed monarchy like Great Britain, though it puts the sovereign power under a sort of distribution, does so on a seemingly awkward and inconvenient plan ; for instead of committing the government entirely to a set of mere agents, and subjecting these to an all-searching supervision at the people's hands, it gives the ordering of public measures partly to the monarch in absolute prerogative, and partly to a parliament of

three estates, of which two are independent of the general will ; so that the electoral sovereignty is, if I may speak so, imperfectly developed, while that of government proper has, to some extent, a character inconsistent with itself, being theoretically despotic in what belongs to the crown, aristocratic in the lords, and popular in the commons only. And though the English constitution, from the irresistible influence of public opinion and the press in modern times, works well at present, may not the inequality, the incongruity of structure that has been adverted to, be found unfavorable to the permanency of the system ? Does it not set the different parts of the system in a sort of antagonism with each other ? As a system of reciprocal checks indeed, it has the *seeming* advantages ascribed to it by Lord Brougham in the third volume of his Political Philosophy. But are those advantages real ? Does not the inequality of the checks referred to put their conservative tendency in doubt ? Public opinion, going with the commons, is naturally jealous of the other estates, and public opinion has become a mighty power. May not the preponderance of the commons, which has been increasing for ages, and is such already as to place the artificial orders of society in a condition of relative weakness, pass the safe point at last, and upset the constitution ? The prerogative, even now, is but a shadow of what it once was ; nor does the upper house of parliament retain half its former weight in the general balance of the kingdom. There is not, as yet, more popular influence in the administration as a whole, than seems desirable ; but beyond a question, the tendency of things is to organic derangement, and it will need all the wisdom of that wonderful nation to preserve the equilibrium of the state from being fatally disturbed in the end.

Of our own scheme of polity it may at any rate be said, that it is homogeneously popular throughout. There are no

discordant elements; nothing to provoke the parts to warfare among themselves. Let us be careful not to introduce confusion where none exists. Above all things, let there be no overtopping on the people's part. The sovereignty of the polls, if true to itself, has no just cause of jealousy towards that of public life. Properly exercised, it must infallibly carry with it a supreme influence in our politics. Why not be satisfied with this? To control the organization of a system, is to control everything. Nor is such a supremacy less real for being indirect. A dominion made sure by moral sequence is just as available, and a great deal more likely to last, than one lawlessly usurped.

And let me add, it is only when the people keep to their functionary province, that the true dignity of their position in the government appears; for it is only then that the light of the constitution falls duly upon them. Their liberty as electors is an organic liberty, and associates strongly in interest with the whole economy it is part of; deriving thus from its connexions a character which no abstract notion of it would be likely to suggest. A people walking side by side with their rulers in the traces of the constitution; leaving those rulers undisturbed in the administrative sovereignty, while the co-ordinate sovereignty of visiting the government, and holding a vigilant inspectorship over it to prevent abuses and corruptions, remains with themselves; is indeed a noble spectacle: there is majesty in such an exhibition; high, broad, mind-filling majesty.

On the other hand, there is something like *læse-majesty* in a wilful trespass of any sort against the electoral power and function of a people thus employed. Electors hold their franchise for the general good. They may violate it individually therefore as trust-breakers, or it may be violated from without

by the misconduct of other persons. In either form the violation is an offence against sovereignty, and touches the vital interests of the state, so that it savours of treason.

Or shall we rather say it is of the nature of a *contempt*? For this may be as well in reference to one branch of sovereign power as another—to the electoral, as to the administrative sovereignty. Why not? When a man disturbs the people's business on the floor of congress or the bench, we call it a contempt, and he becomes liable to most rigorous, most uncere- monious punishment. And how can one be deemed a less offender, who disturbs or prevents a business on which the officering of the government depends?

But there is a difficulty in the way even here. A single elector's share in the sovereignty of the polls is too small to make a wrong against his franchise intelligible to the common mind as a contempt. And so we are thrown back at last upon the law of misdemeanors for redressing it. An offence that touches the interests of all men, and even the political order of the state, must surely be a misdemeanor, besides involving in many instances a private personal injury. It is accordingly settled that the law of misdemeanors applies to this description of wrongs.

Now such wrongs are various.

One form of them has been already mentioned. When a company of voters make a pretext of their franchise for invading the freedom of a government agent, they exceed their own function, encroach unduly upon his, and abuse the trust they owe to the whole country. If the party more immediately injured be their member elect of the legislature, he is the natural medium for making their wants and wishes known to that body; and for this purpose he may be called their representative in special. But in order to a healthful exercise of his

office, he must be free to act impartially as between them and others; giving their wants and wishes a respectful consideration, and then acting as the general welfare, in his own view of it, demands. This is the way of duty and of his oath. To undertake therefore to draw him aside, and constrain him to a local service inconsistent with his sense of obligation to the people at large, is to practise corruption upon one of the minds over whose virtue it is the very business of the electoral sovereignty to watch.

I know not that we have any mode of punishment applicable to an entire constituency in cases of this kind; but if a limited number of persons should presume to tamper with a public officer, to the end of making him rather their servant than the servant of his country, the laws assuredly would find a way to deal with them.

The more usual type of misdoing in the matter of the suffrage is that of undue influence brought to bear upon the freedom of electors themselves. It is from poison cast into this springhead of our political organizations, that we have most to fear. The danger is greatly aggravated by our having made the right of suffrage nearly universal (it was not so at first) among the adult male inhabitants of the country; not excepting foreigners, fresh from places of ignorance and half-civilization, who know little or nothing of our institutions, and are utter strangers to the policy of conservation by which we hope to preserve them through the very franchise we so recklessly commit to all sorts of hands. A vast proportion of mankind are poor; and dependence, not to say servility of spirit, waits upon poverty almost everywhere like a curse. Nor is it possible to deny the power of neighbouring wealth over the children of want in most cases. When therefore you confide to an indigent man, especially if he be ignorant too, a vote which others may be

able and willing to purchase, what security can you have that it will not be sold? Do you rely on his stake in the well-being of the nation? He has none, or none that he is apt to think of. On his patriotism? For once that your reliance may be justified by the event, it will be a hundred times disappointed. I reproach not my necessitous fellow-citizens; God forbid; I only speak of the danger it exposes us to; and if this be real, it may vindicate that feature of the early state constitutions, by which a measure of property was made a test of qualification for political voting, as safer, and consequently wiser than anything which the empiricism of modern amendments has given us in place of it. We have for the most part done away with that feature, (as with some others equally deserving our regret) and have thus enlarged the community of electors to an extent of comprehensiveness that must one day put our institutions to a very severe trial. As Lord Brougham's scoffing objections to the property qualification scarce touch the grounds of its true policy, I pass them by.

Bribery, deception, and party-constraint, are perhaps the three classes of wrongs by which the freedom of the electoral function is most apt to be interfered with.

Bribery, or the use of money for the corruption of an elector, is a grievous misdemeanor; and the receiver of the bribe is alike guilty as the man who offers it. But there is too great a stock of ingenuity and caution abroad to allow of much offending in this grossest of forms. Equivalents, or substitutes, calculated to obscure the evidence of the crime, are resorted to instead; and though disguises do not alter the crime, the laws are cheated of their demands, and very few instances of conviction occur.

Demagogues, who deceive and cajole the people, are a worse evil than bribery in its actual extent. Some of these have

political objects to gain by their movements, while others are mere hirelings, and work for wages. It is needless to enlarge upon the atrocity of their characters and doings. They are the pest of free government everywhere. But what remedy? Except a few rare cases of excess, there is in general nothing for the laws to take hold on.

I will venture to suggest one other topic of ill omen: it is the temptation men in office are under to employ the influence of their stations in the government for partisan ends at popular elections. This is the converse of the abuse electors are guilty of when they impose terms upon their candidates. It is an overtopping in just the opposite direction; the administrative functionary assuming to react unduly upon the appointing power.

The offence here is tangible enough. Should it not be signally visited? To call it a misdemeanor were to speak too mildly of its character. The influence of station belongs to the people, just as the appurtenances of a piece of land are part and parcel of the owner's estate. Public men have no right to it whatever but upon the same trust that qualifies office itself. So that to use it against the popular freedom at the polls is a most grievous perversion; one that should be nowhere tolerated, though our legislatures have as yet forborne to act upon the subject.

How is this legislative connivance to be explained? Are the people of England more jealous of their liberties than we are? The house of commons have long since made it part of the electoral code of that country, that no law of parliament; no lord-lieutenant of a county; no officer of the customs, excise, stamps, "shall presume to intermeddle" with the election of representatives in parliament, "by persuading any voter, or dissuading him;" and that "it is highly criminal in any minister or servant of the crown directly

or indirectly to use the powers of office to influence the choice of representatives." All which has been submitted to, and as far as I know, without complaint. Would not similar regulations become our own statute-books? To say that government agents ought not to be disfranchised, is not to the purpose. No man can have a right to use his official influence for personal or party purposes. No man can have a right to do anything, by whatever means, adversely to the general interests of his country. Suppose the queen of England should claim to be present (as her meanest subject may) at the debates of the national legislature;) would it be tolerated? would the houses bear it for a moment? Persons in high station, and who are clothed with extraordinary powers, as they are privileged to do things which others may not, so there are things of common right which yet the very advantages of their position make it necessary for them to forbear attempting. Propriety, decency, public convenience, public safety, give law in such cases. Men who live upon the bounty of the people, and are advanced by them to great honour, make a strange return when they requite their benefactors, not with gratitude, but with injurious machinations; not by showing a respectful zeal for the people's rights at the polls, but by banding and intriguing together against the free use of those rights, if peradventure they may thereby keep themselves or their party in power, and so defeat the very ends of the constitution in the matter of the electoral function.

Section II.

The remaining topic, namely, the liberty of the people as *citizen-subjects*, has a very close connexion with freedom in its civil bearings, and is yet distinguishable from that, and quite peculiar in its own nature. The phrase, citizen-subjects, does

not often occur. We talk of citizens, and the rights of citizens, continually; but in a sense from which the notion of subjection is entirely banished. Even rights that are strictly political make in common parlance no part of the meaning. Citizenship, if I mistake not, has its vulgar import in the relations of man to man in society; a meaning which it has arrived at by transition from the original and stricter use of the term. Its primary sense is political, not civil. Nor has it any proper jural signification of its own. It implies rights, because these, in matter of fact, are usually found with it; but it directly signifies nothing of the kind. It is in short a word of political rather than civil relationship. To be a citizen is to be a *member of the body politic*, and so within the liegeance and protection of the government. Nothing more.

In this, as in all other relations, liberty is qualified by the duties attending it. These touch not its integrity; they make it none the less; they are but landmarks and boundaries, showing where it is, and what.

The duties which a citizen owes his government are embodied substantially in what is termed *allegiance*; a word of feudal origin, brought down to us from ancient and comparatively barbarous times, when some men were lords of the soil, and others vassal-tenants under their protection; this allegiance of the weaker party consisting of the obligations he was under to the stronger; and which were chiefly two: one denominated *fealty*, and implying devoted adherence, attested by a sort of oath; the other, *service*, such as true followers might be called upon to render in that rude and martial age.

Etymologies do not always enlighten us, but these two ideas of fealty and service are distinctly preserved in the modern notion of political allegiance. Rulers are to us in place of the old sovereigns of the soil; while the serfs or land-slaves of

feudalism furnish, if not the example, yet at least the analogy, from which the freest people upon earth have borrowed a name and something more for the principles of their fidelity to a government of their own creation.

Faith is the first thing. And here we have copied very closely the original conception, having established an oath-test, by which the citizen may be required upon occasion to profess his loyalty to the constitution in the most solemn manner possible. The people want to know in certain cases who are for and who against them in the matter of the government they have set up; and this is their way of finding out in the first instance. Nor can individuals object on the score of their liberty, the very policy of the procedure being that of rendering all men's liberty the more secure. And it is remarkable that one of the occasions which the laws refer to for the application of the oath-test, is when suspected or doubtful persons come forward as electors to exert the right of suffrage; thus intimating as I think, that in order to a man's participating rightfully in the sovereignty of the polls, he must cherish a profound deference for the coordinate sovereignty of public life; which of course he cannot do without disclaiming all pretence of right in the electorships to domineer over the freedom of administrative agents; since the power of these agents is not only the most prominent part of the constitution, but peculiarly the object of allegiance duties, and the proper jurisdictional power for enforcing them. The oath imposed is indeed general, but the stress of it lies in this bearing. How unlike the English oath, which promises fidelity to the prince alone, although the governing sovereignty is but partially in him, and the electoral sovereignty not at all. We have no such anomaly in our practice. We do not swear to be true to a part of the government, but the whole.

As to the *services* which allegiance may be said to draw after it, they are various.

First, *military service*.

As however the war-power of the government is defensive only, the citizen's obligation to come in aid of it has a corresponding limitation. Not that he may in all cases set up his own judgment against that of the legislature in direct resistance. His opposition must be through the press and the ballot box. In point of principle, however, rulers can never rightfully call upon the people to uphold them in a war of manifest aggression. The people should rather put an end to such a war by every constitutional means within their reach, than share without complaint in the expense and guilt of it. That they are to go with the government *right or wrong*, according to the maxim of some shameless persons, is as foreign to the duties of allegiance, as it would be flagitious in point of morals. Loyalty and crime have no connexion with each other. In the nature of things they can have none.

Secondly, the service of *pecuniary contribution* to the wants of the state.

But while the power of taxation is to be cheerfully submitted to in general as a legitimate power, it is nevertheless, like the power of making war, limited. In one case as in the other, there may at times be difficulty in determining where rightful power ends, and excess or wrong begins. Let us not judge rashly or narrow-mindedly on such a question. Still, in general truth, the proposition is quite clear, that no citizen can be justly taxed for any purpose of waste, prodigality, or unrepblican pomp in the management of the nation's affairs.

Thirdly, *official service*, when needful to the country, and regularly called for by its voice.

In the higher walks of office this is seldom felt to be a bur-

den, and allegiance is apt to be little drawn upon for motives of compliance. But it is often otherwise in the humbler and obscurer pathways of public business. How very burdensome the jury-duties of the courts. And yet how necessary to be done, and how essential to the security of the very liberty they distress the enjoyment of. And there are other instances. Men must sometimes be made justices of the peace, sometimes sheriffs, often constables, overseers of highways and of the poor, against their will, lest otherwise these offices should go unexecuted, which would be a far greater evil.

In matters of police, because it is impossible to have magistrates and bailiffs everywhere present without interval, the laws devolve upon all men somewhat of the duties of a peace-keeping and crime-visiting ministry, for the prevention or cure of disturbances, and taking culprits into custody, without waiting for written warrants. And should a magistrate appear and call for assistance in the like purpose, it is even a misdemeanor to refuse him.

In short, to every end of cooperation that is both lawful and important to the general welfare, the citizen must make the cause of government his own, and be *government's man*, according nearly to the very terms and spirit of feudal homage. His allegiance goes that length.

But without proceeding to further particulars of a merely qualifying nature, let us notice some of the *positive features* of the subject.

That liberty has moral limits and qualifications (all allegiance is moral) can be no matter of regret to a good man, for he knows experimentally that he is not the less free on that account. If then his freedom have a number of peculiar and signal advantages from the institutions under which he lives, he may rate these all at their full value, and take the sum of

them for the amount of his political treasure on the liberty score.

Perhaps the first item I may be expected to mention here is the broad characteristic right of *self-government*; which consists, not in the undefined fancies that are sometimes made to stand for it, but in *the co-operative working of two distinct sovereignties*, as already explained;—the one administrative, the other electoral; so adjusted and balanced, as between themselves, that the great objects of both—the right management and lasting conservation of the state—are hopefully secured.

Were we however to begin with this, there would be nothing else to add, for it includes everything. Instead of being a liberty, it is rather a system of liberties; a roof and framework of gold, from which our liberties are let down, in lamps of glorious lustre, over all the right ways and passages of life.

Self-government is, only possible to a small portion of mankind as compared with the whole. To make it permanently possible anywhere, there must be certain political forms in preference to others; and in addition to these, a measure of popular virtue, intelligence and discretion, equal to the steady maintenance and use of certain cardinal rights now happily incorporated with our polity, and among the more prominent of which are the following:—

1. The right of every citizen *to remain in the country*, so as to enjoy the security of its laws. If there be a power in the government that can send him abroad against his will, under whatever pretext, the house of his liberty is upon the sand. British subjects, it is said, cannot be expelled the kingdom but by act of parliament. Let it be regarded as a precious peculiarity of our lot, that the rule with us has no exception

whatever. Our government has no powers but such as we have given it, and it will be hard to find in the charter of cession an authority for making us outlaws by statute.

2. The right of *keeping and bearing arms*. The citizen may have occasion to become a soldier, and he is not to be denied the proper implements of a soldier's calling. This is the natural counterpart of another of our principles, to wit, that standing armies are dangerous, and not to be kept up in advance of actual need. The citizen-soldier is our first reliance. And as the being prepared for war is one of the first guaranties of a nation's peace, so it belongs most pertinently to a state of peace, that the militia forces be always armed and ready for emergencies; not by having secret weapons about the person like highwaymen, but openly, manfully armed for patriotic service.

I will add a further consideration. A man armed is more a man than when stripped to the weakness of nature. He is more a man in spirit, as well as in physical force, and thus the distance between him and the depositaries of public power is sensibly lessened; experiments of tyranny are the less likely to be tried upon him; and if tried, he is all the readier to meet them.

3. The right of *free access to the magistracy and the courts*.

Most other rights depend measurably on this for their security, as this does on the right of continued residence within the canopy of the laws. It is consequently fundamental. Public order could not be maintained if there were no peaceful remedies for the evils that continually threaten it. Judicial intervention is often necessary. The citizen must be relieved if possible of all occasion for redressing his own wrongs. The necessity of this for the great end of public order, has led the judges to a fond maxim, namely, that it is actually realized by

the subsisting practice of the courts ; or at least so nearly realized, that whatever deficiencies may be found to exist, they can be supplied by judicial invention as cases of need arise ; which, however, is not exactly true. Offences abound beyond the possibility of legal redress. There are difficulties of proof ; difficulties of discriminative judgment ; difficulties of penal handling ; stranger still (if I may speak from what I see around me) difficulties as to *time*, *labour*, and *expense*, in doing what is feasible in itself. It was among the provisions of the great charter in England, that justice should not be *delayed*. Assuredly, so far as it is delayed, the citizen's liberty of suit in the courts, though not ostensibly barred, is yet frustrated ; which I take to be worse, as really amounting to a bar for the time, without allaying, as a bar would do, the plague of litigation or the heart-sickness of deferred hope.

Two things are requisite to the full enjoyment of the liberty in question :—one is, that there be courts enough, and judges of the right sort, to do the business of the country promptly and well ; the other, that the people's access to them be unembarrassed by any needless impediments.

Now there is such a thing extant as a *policy of restraint* for repressing litigation, lest there should be overmuch of it. I am sorry to say that judges sometimes act upon this principle, as the history of the law of character, for instance, loudly witnesses. Every one knows that for redress of slanderous offences, the doors of justice are but half open at this moment, by reason of the narrowness of the rule long since adopted in judicial practice, touching the actionable quality of such offences. And the rule was made thus narrow for the very purpose of nipping in the bud what it was feared might prove an overgrowth of law business from that soil. Was this war-rantable ? I do not ask in reference to the public peace, but

to that *liberty of free suit* in the tribunals, which the citizen is expected to rest in as his stipulated compensation for the natural license of redressing his own grievances. Is it a just policy in this respect?

Yet it is one which some of our legislatures have evidently adopted, in subjecting suitors to the necessity of giving surety-bonds in certain cases, as a condition precedent to having their rights of suit beneficially acknowledged. I allude particularly to cases of injunction bills in equity, and of appeals and writs of error, with some other forms of procedure for bringing judgments once rendered under reconsideration, mostly in the higher courts. The subject is not without embarrassment, but to legislate upon it with a distinctly *curbing* intent cannot be right. Is litigation an evil? Be it so. It is not so great an evil however as the universal disorder which it is simply an expedient to prevent. Shall we go back to the settling of controversies by civil violence and bloodshed? Methinks it is better to give way unreservedly to the expedient of litigation. Surely we must take the world as it is, and make the best of it. Offences will come, and they must be answered for—peaceably if it may be, but otherwise by force of private war. In a word, if men may not litigate, they will fight. And just as you straiten them in that part of the alternative, they will make up for it in this.

But you will say it is enough to give a suitor one hearing, or a reasonably free access to courts of primary jurisdiction. Is it so? Our vaunted liberty then extends only to *some* of the tribunals of the land. And to whom belongs the high privilege of the rest? The explanation is easy, but it is not satisfactory. Too hard conditions are imposed, I think, upon the rehearing of wrong judgments. The old practice of giving credit to certificates of probable cause, seems more consist-

ent with first principles than the putting everything on the one basis of money securities. As matters go at present in New-York, some classes of persons have literally no liberty of suit in the upper courts. Men reputed as bankrupts, for example, how are they to give bonds in double the amounts of their adjudged liabilities? Perhaps the decisions against them are erroneous. Perhaps their very bankruptcy has been owing to the wrongs these wrong decisions uphold. Yet the appellate jurisdictions are closed against them: they cannot give the bonds. Nor are they alone in this. Strangers, unknown in the community where judgments have been rendered against them, are disfranchised to the same extent. And I suppose we must enlarge the list of the unfortunates by adding nearly the whole tribe of working mechanics, petty farmers, and drudges of all sorts. Appeals and other proceedings of the kind are not for such. They are for men in better circumstances. Which may also be said of a large proportion of injunction bills, though in courts of original jurisdiction. I speak of facts, not of legislative intentions. It is quite certain that the liberty of litigation is unequally secured to different classes of citizens. The common law was more even-handed than these statute regulations. Is poverty a crime? Or is it really necessary thus to aggravate the evils of a depressed pecuniary condition, by way of keeping men from stickling too much for their rights? A French writer of celebrity has lately insisted, that even the law of *bail* ought to be mitigated in its bearing on some of the humbler portions of society. At any rate, if free access to the courts be a constitutional right, it is a right common to high and low, rich and poor, and should be made available to all, with as near an approach to equality as possible. Nor is there any colour of reason for supposing that appellate jurisdictions, more than others, may be optionally put

beyond the reach of the multitude. Courts of justice, all of them alike, are public accommodations, and as truly popular in design, as are roads, bridges, fences, weights and measures.

4. The *habeas-corpus*, or *prisoner's writ of deliverance*.

The great importance of this writ will justify the giving it a place by itself, notwithstanding its connexion with the last topic.

It is a writ of common right, by which persons wrongfully imprisoned may have their griefs at once inquired into by a judicial officer, to the end of their being forthwith set at large; which of course takes place, provided the wrongfulness of their detention is made to appear.

Arrests by warrant for treason or felony distinctly charged, are not to be deemed wrongful for any purpose of this kind; the matter is too gravely interesting to the general peace and welfare to be drawn to so summary a conclusion. Neither can arrests in execution of the solemn judgments of the courts be thus got rid of; it were inconsistent with the first principles of judicature to overrule records upon side-bar applications: judgments may be erroneous, and may be therefore reversed; but their reversal must depend on other and higher records, framed with like solemnity as their own: so that a person detained upon final process can never say he is wronged by such detention, so long as his sentence of conviction stands firm. These however are about the only exceptions to the universal fitness of the remedy in question.

The writ may be had at all times for the asking. The judges, in a proper case, have no option to refuse it. They would, by doing so, incur statute penalties which it is scarcely conceivable they should ever brave.

So that the citizen's liberty is now safe against what was once its most formidable, most besetting danger on the part of

government—I mean, general warrants; such as have peopled the towers and bastiles of other times and countries, not with “living death,” but rather with *dead life*—the most valuable members of society, sequestered from their activity and usefulness. Till of late years (comparatively late) the people had no chance of making headway against tyrannically disposed rulers. These warrants were a kind of pitfalls in the paths of political virtue. Whoever dared to go forward in the people’s cause, it were as if the earth swallowed him; he was suddenly missed, and the places that knew him were to know him no more. Unconvicted, unquestioned, unaccused even, he was hurried off to a dungeon, there to perish by assassination; or to rot. And the fate which thus deprived the people of their best champion, could not fail to deter others from following his example. What hope for freedom under such discouragement? Who but the truly godlike—a race no age abounds in—could be expected to stand forth in her behalf?

The *habeas-corpus* act of 31 Car. II. ch. 2, was nearly the last of a series of what I may call *liberty-statutes*, which the people of England succeeded, during a long period of time, in procuring to be passed at intervals, for their protection against the too prevalent despotism of the throne; commencing with the great charter of king John, and running down through nearly five centuries to the act of settlement at the revolution; all in one train of policy, and looking to one end—the establishment of constitutional securities against an undefined and ever usurping prerogative. There is nothing in history finer than the tale these statutes tell of the popular soul-travail that brought them one by one to the birth—a progeny of public virtue, such in constancy and perseverance at least, as was never exhibited by any other people under corresponding trials. Reactions against bad government may happen anywhere, and any

number of times ; but such movements are apt to be tumultuary, and without definite aim—a sort of volcanic breaking up of old institutions in utter thoughtlessness of what is to follow, save that it will be a change. The struggles of English freedom have been widely different. They have had *mind* in them ; I mean a *thinking*, as well as a feeling principle. And this mind, being intellectual and moral in due proportion of parts, and having thus the elements of spiritual health, has seemed to be immortal both in purpose and energy. It has lived, at any rate, through all manner of vicissitudes, some of them violent enough ; oppressed occasionally, and to appearance hopelessly cast down, yet not extinguished ; always cherishing its favorite design, however interrupted and baffled in the pursuit of it ; full of courage, as of calculation ; fighting the battles of political righteousness from age to age, as circumstances permitted ; and though losing many hard-fought fields, or at least the fruit of them, yet ever, after a night of weakness and pain, not despondency, returning again to the conflict with indomitable resolution ; till at length the sun of victory rose, and kept the ascendant, leading on a day of triumph which is still in progress at the end of more than a century and a half of ever-growing brightness—may it be, as the days of God, a thousand years.

I say not that British polity is now perfect : it is a work of human, not angelic hands : but I say, the constitution of England, as compared with most others that have lived long enough to be understood, is eminently free in its working ; and that it is thus free by heaven's blessing on the patriotic heroism of the national spirit ; free in short, because the people would and will have it so. As far as principles are concerned, the liberty-statutes I have mentioned make up the greater part of its bulk ; and of those statutes—the great charter, with its

two and thirty confirmations, the petition of right, the *habeas corpus* act, and several more—it may suffice to say, that they are in substance among the precious things of our own economy too. To all liberal intents, that constitution is a bundle of trophies won from tyrants in the cause of freedom. Let us not grudge our meed of praise to the moral and political worth displayed, through such a lapse of years, in winning them.

5. The *right of petition*, as to grievances not in general judicially relievable.

A liberty fit to stand next to that of the *habeas corpus*. In the use of it the citizen may address himself either to the legislature, the political executive, or even the judges if there be occasion; may complain of evils suffered, or only feared; and may ask or deprecate, solicit or oppose, the action of government, as he thinks proper, using respectful language for the purpose. What weight his arguments are to have upon those to whom he offers them, must depend upon their merits. If however he be guilty of no ill manners, his paper is not to be superciliously spurned or neglected.

The constitutions of the particular states are strenuous for this right. It would be one of constitutional rank though they were silent on the subject. Petition is the very breathing of nature, under wrongs real or supposed, in a state of depression; nor is any inferiority of station or condition too low to admit of it. The Israelites in Egypt, the most abject of slaves, “went and cried unto Pharaoh,” we are told (Exod. v. 15), and Henry, the commentator, says, “there was no law against petition.” Such a law would have exceeded the effrontery of tyranny itself.

The right however has been often interfered with. Despots do not like to be drawn to a parley with their subjects, particularly if these make common cause and join hands. As

might be expected, the more usual objection to petitionary movements is their supposed tendency to bring the people too much together, and to nurse a spirit of complaint and disaffection among them; dangerous in possible cases to the public peace. A charge that might be more than colourable in some communities; but where the popular mind has been raised by culture and religion to a competency for political self-government, social habits and frequent assemblages of the people for mutual counsel, instead of being symptoms of disease in the body politic, show rather a healthful state of things, such as, if infested with disturbing influences, has just the vigour necessary to withstand them, or to throw off their effects by natural means. Let a community fit for freedom be dealt with as they should be, and there is little to fear. Their complaints, if they make any, will either be well founded or visionary. If the former, common justice is an easy way of setting all to rights. And even should the alleged grievances be unreal, the difficulty may be soon got over by explanations which it will be no condescension, but a pressing duty on the part of rulers, to put instantly forward. Either way, therefore, if any serious commotion arise, the fault will seldom lie at the people's door.

At any rate, to a respectful representation of their views and desires no constitutional impediment can ever be opposed. In which respect the right of petition ranks higher than the *habeas-corpus* itself. There may be times, it is said, that will justify a suspension of that writ; and a power has accordingly been lodged with Congress for the purpose. A dangerous power. May it never be used. The *habeas-corpus* and the right of petition are essentially of one grade, and I see no cause to believe that it can be requisite or prudent, in any circumstances whatever, to bar the use of either for a single moment.

Such a precedent would be a misfortune indeed. Let us beware how we put any of our vital liberties in chains.

No wonder tyrants shrink from being parleyed with by the people. There is a reason for it. And that reason shows the desirableness of the conference on the people's part. Power, in its high places, looks larger and grander than it is. We want to bring it down within speaking distance. It is good to look at it closely, and to try conclusions with it. We shall thus discover that it has a partner called *duty*, inseparably wedded to it; and though of much humbler and less showy presence, yet in truth, its "better half." This duty, however loftily connected, is a thing we can converse with face to face, especially when we find ourselves the natural and proper objects of its regard. Calling therefore upon public men as persons under *obligations of service* towards us, we rise perceptibly in relative consequence, as the eagle of power comes down. And rising thus, our spirits also rise; our nerves get tone again; the thought suggests itself, that if justice do not come to us in the matter, we must even *seek it out*; and we become gradually equal to the enterprise. It was I think in this manner that the revolution fathers girded up the loins of their minds for the great struggle of their day. To argue for the right is to become intelligently confirmed in it, especially if opposition be encountered; and when right and interest go together in the argument, resolution rallies around conviction with a force not easily withstood.

6. *Free communication, by speech, writing, and the press.*

Here again we have a fundamental right. I need not speak of its importance. That it is fundamental in our system is proved by the uniform tenor of the state constitutions; to which may be added the yet higher evidence of its unequivocal deriva-

tion from God's gift of communicative faculties and propensities to mankind.

The press has been termed the palladium of free government ; and beyond a question, no government can be long free, without a measure of intelligence and an elevation of character among the people, such as nothing but a liberal circulation of knowledge and opinion—nothing certainly apart from these—can be expected to produce or maintain. And while speaking and writing are available to some extent in keeping up this circulation, the press is an engine of tenfold greater efficiency for the purpose. By the press the whole land may be filled at once with information on any given subject. By the press a single patriot can impart his thoughts to millions of minds in a few hours, and make millions of bosoms heave with his own enthusiasm. “The public opinion tribunal,” that wondrous court of modern times, which Mr. Bentham will have us look upon as a part of government itself, is open to every wise and good man's efforts through the press, to do all the biddings of truth, of justice, and of rational freedom.

How essential in a country where there is a popular electoral sovereignty behind the government, and where public opinion has consequently an efficient bearing on the agencies of the system, that the press, as well as the tongues and pens of individuals, should be no further restrained than what I may call the necessities of police require.

In which respect indeed, Americans have little to complain of. As a general rule, we are free to *publish truth, with good motives, and for justifiable ends*, on any matter of political interest, be it men, measures, or principles. Farther than this might be too far. It will be well if our enjoyment of the right in question do not make us forgetful that it is a right not a

whit dearer to the friends, than it is odious to the enemies, of human liberty.

The wrongs it is exposed to from these enemies are three-fold :—by censorship, by numerical restriction of presses, and by having the law and practice of the courts in libel cases tampered with.

Censorships, which began I think with “The Congregation of the Index” at Rome, and have found their way thence into many of the countries of Europe, are not like to be soon tried in America.

The same of arbitrary limitations as to the number of presses tolerated. Not even the licensing process will be soon thought of for this purpose here by any but madmen.

And probably the period is far distant when the law of libel itself can be regarded by sane persons as a fit subject for tyrannical experiments. This however is the point of easiest access for such a purpose ; and it will not be amiss to keep the leading features of the libel law distinctly in mind, by way of being ready for events. As late as the latter days of the star-chamber, abuses in all three of the forms that have been mentioned were tried even in England without scruple.

First then, “with good motives and for justifiable ends,” (I use a New York phrase) a citizen may publish any manner of *true statements* touching the acts, agents, or principles of the government. He may sound the tocsin when the affairs of the country, or any part of them, are ill managed. He may call traitors by their right names. He may dive fearlessly into the very elements of the constitution, and discuss them *pro* or *con*, taking care to address himself to men’s reason and not their passions ; to offer lights to their intelligence, not firebrands to their hands. There is no one institution of a public nature which it is not lawful to hold up to universal attention in all

its merits and demerits ; so however that the aim and drift of the proceeding be neither seditious nor immoral.

Secondly, upon the question of the end and motive of the publication, the author or publisher is entitled to have it judged of by a fair construction of its whole tenor, together with the occasion and circumstances in which it is put forth. Garbled passages are not the test, the whole is to be taken in connexion.

And as to the occasion, this is sometimes decisive by itself alone. There are cases of privileged communication so called, which carry a presumption of fair intent upon their face. Cases of petition are of this character. So are those of necessary law-papers, stating facts pertinent to the questions that give rise to them. Whenever the occasion is one of public duty or right within the politic protection of the laws for any reason, the motive is presumed good, and the end justifiable, as of course, save only in regard to wanton excesses and abuses, which are to be answered for upon common principles.

Thirdly, if a citizen be indicted of the crime of libel, he may give the truth in evidence in the way of exculpation.

This right, which seems so very clear, continued to be strangely interfered with and denied in England long after the abominations of the Stuart reigns had ceased, although there were antecedent decisions of the courts in favour of it. I think it may be regarded as a common-law right, over which the influence of the crown had gained an unseemly mastery for a time, and which remained in bondage till it was at last set free again by the famous libel act, about the era of our independence.

With us there have been doubts upon the subject, such as the course of the English courts might be expected to raise. For the most part we have claimed and asserted the right from the beginning ; chiefly however by constitutional provi-

sions, and a number of statutes framed upon the English model. I regard these as simply declaratory; making sure to the citizen what he was equally well entitled to before, but could not so hopefully claim.

The truth of a statement will indeed not always justify it, for it may fail to show innocence of intention in the author, and intention is of the essence alike of innocence and of crime. An ingenious writer may use a set of undoubted facts for the direct purpose of stirring up a sedition. Has he a liberty for that? So he may draw forth from the private history of an individual, facts of no public concern, for the malignant gratification of his own malice in spreading them gratuitously before the world. Has he a liberty for this? I am sorry to say, that were he prosecuted by private action, the truth of the facts, even in such a case, would be held to exculpate him; an inconsistency in practice which there is surely no sufficient reason for, and which ought therefore to be exploded. Men must be deemed answerable for their intentions together with their acts. God's law assigns no liberty to malice; none in the field of truth, more than of falsehood; and why should human laws be more indulgent?

Fourthly, the right of a citizen under government accusations to be tried by his peers or fellow-citizens of the county where he lives, is one of the last moment to him as a freeman. But it is too notorious, too dear to the country, and too thoroughly grounded in the fundamental laws, to require to be enlarged upon.

There is however, finally, a point connected with the right of jury trials, that deserves particular notice; I allude to the jurisdiction which it is proper for jurors to exercise in reference to the legal character of the facts submitted to their judgment.

Among the earlier decisions in England, when the prerogative was stronger a great deal than in later times, it was never

seriously attempted, I believe, to restrict the jury in a libel case to a jurisdiction less broad and comprehensive than that of a total deliverance or condemnation of the accused party, according to the very words of the issue laid before them in the record. So potent was the common law of the subject, though under reigns that were decidedly tyrannical. But strangely enough, as time went on, and liberty was gaining ground continually in the minds of the people, crown influence effected a remarkable change in that of the bench in just the opposite direction; till at length it became common, habitual, for judges to tell juries, as Elizabeth used to tell her parliaments, that there were certain matters they must not presume to meddle with; which matters were nothing less than the very drift and intention of the act charged upon the accused party; in other words, whether he was guilty or not in the true sense of the issue; for that this was a point exclusively for the court! The jury were to confine themselves to the mere fact of publication, and the innuendoes of the indictment, stopping short entirely of the question whether the thing published was good or bad, or the act of publishing criminal. And as if to garnish usurpation with a spice of absurdity, the verdict was nevertheless required to be *general in form*, though embracing only a *part of the matter in issue*; that is, to be a verdict of *guilty or not guilty*, though the question of *intent* (and of guilt by consequence) was not to be decided by it. In short, the jury's province was reduced to insignificance. They had no power of deliverance whatever. They were just made use of as puppets in a game of political intolerance; finding the accused really guilty, whether he was guilty or not, and leaving to the judges to do what they pleased with the verdict. A mere mockery of deliverance. If the court in their discretion happened to conclude in favour of mercy, very well; the verdict was then to pass for nothing, and judgment

to be arrested. But in every case without exception, they had it in their *power* to punish. What a state of things! A criminal jurisdiction, withdrawn virtually from the jury-box and made altogether *judicial*!

And if such a state of things was possible in England during the Brunswick reigns, it becomes us to be watchful.

The jury's province in a libel case is coextensive with the issue. If they see no vicious intent, they ought to acquit the party, and not hand him over to the discretion of the court. Whatever confidence we may have in our judges, it is a point of liberty never to be given up, that when we are accused of crimes, our deliverance or condemnation is *entirely* in the jury's hands. They may indeed find special verdicts if they see cause. But they may also refuse to do so. They should listen to the bench as the proper source of instruction upon points of law, but they are to put the law and the facts together and decide for themselves upon the conclusion to be drawn.

7. I mention next, as among the great features of our liberty system, that principle of *equality* so widely and zealously but often fondly talked about, which has acquired particular distinction in this country from the very solemn testimony of the fathers of 1776 in its favour.

It is of course a first principle. But what does it import? Equality of property?—of public honours and emoluments?—of weight in the concerns of social, civil, and political life? None of these things. The equality affirmed by the declaration of independence is one of *rights*, as distinguished from objects of right external to us; of *original and elementary rights*, rather than of *rights applied*. It is therefore no way inconsistent with the actual differences of estate, rank, character, influence, and employment, consequent upon the historical progress of society. Let us explain a little.

By God's gift of our *being*, we have the right of *personal security*. From his bestowing *active powers* upon us, and placing us in circumstances that render it desirable and necessary to employ them, I infer, in like manner, the right of *personal liberty*. And because he has surrounded us with *objects indispensable to our comfort*, but which, in order to their being enjoyed and made the most of, must be appropriated to individuals, as well for the encouragement of their enterprise and virtue as for necessary use ; the right of *property*, that is, of holding in *separate ownership* the things we have honestly acquired, seems also to rest, without the least uncertainty of deduction, upon the same basis, namely, the endowing goodness of the deity.

Here then we have three rights, which I call original and elementary. Are there any more such ? I believe not.

The applications of these rights, as to *objects*, are indeed infinite. And for ends of common parlance every specific application of a right is apt to be regarded as a right by itself. The farmer speaks of his field, the merchant of his ship, the author of his copyright, the magistrate of his authority, as if each were a case of jural entity apart from all others. But a moment's reflection shows that the right is one throughout, and that it is only the application of it that varies. So the man of pleasure, the man of business, and the man of prayer, has each his separate form of applied liberty, and these forms divisible into numberless others in the way of subordinate detail ; all however being branches and minute ramifications of a single stock principle, the right of personal freedom. Even the right of security seems one thing when we speak of life, another when character is in question, and another still as applied to parental, filial, and other relative interests ; whereas in truth these varieties are superficial, an essential unity run-

ning through them all as before. So that our rights of every kind are resolvable into those of *being, doing, and having* ; or as more commonly expressed, *security, liberty, and property*.

In which respect it is obvious that all men are born equal. But though equal in rights, they are extremely otherwise in physical and mental capabilities, so that as soon as they begin to act, differences of condition arise among them. Thousands of causes vary their degrees of success and prosperity in the use of their rights. One becomes rich, another poor ; one is loaded with public favour, another with public scorn or detestation.

The simplicity of jural elements is lost sight of in a confusion of actual diversities which no man can number. Nor is this to be avoided. You might as well attempt to keep the waters of the earth in a state of equable distribution, and abolish rivers and oceans, as to deduce equal results from the action of unequal causes in the moral world. And even were the utopian fancy realized for once, and the extremes of the social medley brought as by miracle to a middle average of conditions, the thing would be but momentary—it could not be maintained without a perpetuation of the miracle. The course of nature is otherwise.

What then is the law-giver to do ? Is he to fight against nature ? Can he do so with success ? Does it comport with God's providence that he should ? As God and nature then are for an *inequality of conditions* among men, he has no alternative but to conform his arrangements to theirs ; in other words, to legislate for the world *as it is*, and not as he might wish it were ; protecting individuals who have diligently cultivated their rights, in the legitimate fruits of that culture ; and on the other hand, restraining those who have been less active, less prudent, or if you please, less fortunate, from attempting to make up the deficiencies of their own lot by preying on their

neighbours. All agrarian projects have this difficulty to contend with, that as projects of *settlement*, that is, of permanent order, they are essentially impracticable.

But even if it were possible to reduce mankind to an equality of conditions, and to keep them there, would it be just? nay, would it be compatible with that very equality of *rights*, which is made by inconsiderate persons a ground of asking for it? Government have no commission to create a state of things for their superintendence; they are regulators and peace-keepers over a state of things made to their hand. They find society already in existence; and it consists of men endowed by heaven with equal *rights* indeed, but who have no manner of equality among them as to talents, skill, inclinations, passions, habits, advantages of any kind for turning those rights to account. Are government to shut their eyes to this distinction and its consequences? Are they to undertake that profligates shall have as much wealth, and felons as much liberty as men of prudence and virtue? Must they call upon the enterprising citizen to divide the fruits of his genius and activity with the doting sluggard? Their line of duty is very different. They are simply to see fair play among all sorts of competitors in the race of juriculture; taking care that he who wins a prize *have it all to himself*; and on the other hand, that the fool, the idler and the knave, who win nothing, have *just what they win*. To protect a right, is to protect the use and avails of it; for if the term mean anything, it means a title in the holder of the right to whatever he can and does honestly apply it to in the way of acquisition. The three original rights that have been mentioned are like three metaphysical hands, adapted to grasping objects of corresponding qualities, as power and opportunity serve. If an individual gather much, it is well; equality of right entitles him to it *all*: and should his gains be

but the beggar's rags and wallet, these are the produce of his jural husbandry, and by the selfsame rule of equal justice he is entitled to *no more*.

I conclude therefore that the constitutional principle under remark, instead of giving countenance to the disorderly doctrines too often set afloat upon the credit of it, is entirely conservative in its nature and tendency ; requiring just this, that the proceedings of government agents be *without respect of persons*, and precisely on the assumption that the people have identically *one set of birthrights under the laws*, be their actual conditions ever so dissimilar, ever so widely and even painfully contrasted with each other. It is a principle of order and not of disorder ; of administration, not revolution. The great evil which it is designed to shut out from the country, instead of being that of men's natural and incurable differences of estate and condition, is the evil of differences *artificially superadded to these*, for the purpose of making distinctions where none exist by nature ; the evil of *privileged classes*, of patented high life, lifted otherwise than by merit above the heads of the commonalty. Things may do well enough in other lands, which our institutions will not bear. Equality with us is nearly what I think the French mean by *fraternity*. It is a word of kindred for the political family ; making one brotherhood of us all ; and this according to the analogy of our law of inheritance, with no eldest sons and no cadets, no halfbloods and no bloods above the average of the mass.

What is inconsistent therefore with the true doctrine of the subject, will be easy to discover.

Dissimilarity of estates in the matter of property, is not. We have seen this already.

Dissimilarity of standing as regards the right of suffrage, is not ; although complaints are often heard as if it were. This

right is no boon either of nature or of administrative government; it is a trust from the constitution, reposed, upon special considerations, for the country's benefit, apart from all intention of peculiar advantage to those who are to exercise it.

Dissimilarity of participation in the powers, honours, and rewards of public life, is not. For office again is a trust, of which the country is alone the rightful beneficiary. And because important posts of service are few compared with the number of persons who might be willing to fill them, selection is unavoidable. To a large extent, the choice of public servants is made by the people themselves. And though rulers are allowed the patronage, as it is called, of some valuable employments, this patronage again is to be used for the people; it is no incident of political station, but a kind of *electoral vicarage*; a choosing by the substituted action of a few for many, in the great organizing process of the suffrage function. Public men are put in the people's place for the purpose, upon a policy of convenience, that is, to save the trouble of popular elections where these can better be dispensed with. And their agency is by special commission; extra-official, *supra-official*; appertaining to a sovereignty at once beyond and *above* that of mere government, and which admits of no manner of caprice or license in the conduct of its ministers.

Even in what is termed discriminative taxation, which has been a frequent subject of complaint in this connexion, if the aim and policy of the legislature be truly national, no accidental disparity of effects, as between different classes of men, or sections of country, will involve them in any just reproach as acting contrary to the law of equal rights. Should however the good of the nation be but the pretext, while the design is one of actual favoritism, that law suffers violence. Respect of persons lies not in accidents; the design is the main test.

On like reason it would seem, that if the freedom of litigation be straitened in the poor man and not in the rich, by enactments made with a knowledge that they must have this operation, and upon the very intent of curtailing the business of the courts by such means; the poor man is oppressed; unless indeed it can be shown first, that it is for the general good to put a forcible restraint upon law business, and secondly, that there is no way of compassing the object by checks less partially imposed.

We profess to have no privileged orders of men; and it is against our principles in like manner, to allow any one class of persons to be relatively depressed by the laws, save only as this may be a casual consequence of measures strictly public in their aims, and of general importance. Whatever is really necessary for the common welfare, must be submitted to, though bearing harder upon some than others; so however that the inequality be in every case the least possible. There are differences sufficient among human lots, without the aid of power to increase the number. It is the beauty of our institutions, that while they suffer every man to find his own level, they put none up or down by artificial means.

The constitutional precaution against church establishments is a fine instance of the national aversion to privileged orders. A religious sect, preferred by government, is a privileged order of the very worst description; a kind of ecclesiastical nobility, favorable to no one interest of a free country, and which has served the cause of despotism alike in the churches and the states of Europe for fifteen centuries past.

On the other hand, we have among us still, in certain quarters, an evil of an opposite character, which the constitution found in the country and was unable to eradicate; the melancholy evil of a class of human beings forcibly degraded *below*

the common level of citizens, and made hewers of wood and drawers of water for another class, their masters. The slavery of the southern states of the union is the dark spot upon our disc.

Yet the reproaches that are cast upon us from abroad on this score, are undeserved; for besides that our principal maligners have had slaves as well as we till a very recent date, they are the authors of the very curse they taunt us with; having literally begun and finished the work of entailing it upon us while as yet we were colonies.

What we were to do with that horrible entailment when at length our political dependence ceased, was the problem. The well-being of the country called aloud for union. To secure this, a compromise was necessary. In yielding to that necessity, we did what seemed, upon the whole, to be for the best. We created no slavery; we only left it as we found it. Nay, instead of leaving it spread over the whole land as it had been before, we left it limited in extent, and likely, as we trusted, to melt at length away under the influence of reason and religion, its natural destroyers.

The constitutional fathers are therefore not to be blamed. They went not a step further than it was evidently right to go. Slavery was no part of their policy. It was an exception to all their rules. They bore with it, for the reason that they could not help doing so. They did the very best concerning it that could be done in the circumstances—they let it alone; a civil abuse beyond their jurisdiction, and which it was hoped the civil laws would ultimately subdue, with many others alike peculiar to their cognizance.

I refer again to the caution of the language applied by them to the subject. Instead of the word *slave* being used in the constitution, the softer phrase of "*persons held to service*," was

preferred. A phrase, too, that was softer only because it *meant less*. Slave is a word of cruel import ; it includes all the degrading attributes of servile abasement, which time, and prejudice, and never-ceasing injury can crowd into a name of wretchedness. These things the constitution turns away from, and confines its recognition of slavery (if such it be) to the mere *bond of service* implied in it, the fact of *civil* subjection, that makes the slave a servant, but nothing worse. In which respect he classes with multitudes that are not disfranchised. Common apprentices are "held to service." Sons and daughters under age are "held to service." And we read in the constitution itself of persons "held to service" *for a term of years*.

So that of slavery, *as such*, the constitution knows nothing. Slaves, by that description, could not I presume be reclaimed under the provision as to fugitive servants. Much less could they be thus reclaimed as chattels or live stock. For being *persons* they are human beings, and have rights of their own : are capable of social relations, and have heaven's warrant for entering into them ; sustain relations of duty to God himself, which all must hold sacred ; are entitled to be treated by their masters as fellow-men, and fellow-travellers towards a reckoning where balances will be struck upon principles to which the distinctions of worldly rank and state can be of no significance but as gauges of responsibility. In a word, they are *members of the body politic*, owing allegiance to government, and having correlative demands upon the guardianship of the laws. To my mind this is *citizenship*.

Others I know dispute the conclusion. And they do so on the ground that not political relationship, and not the rights attending it, or a capacity for them, but *actual freedom* in the enjoyment of those rights, is what a man must have, to make him a citizen. Some have even doubted whether coloured

freemen can be citizens so long as they experience the measure of disfranchisement that is strangely meted out to them at present in most parts of the country. A late eminent writer * takes a middle course, allowing free negroes to be citizens, with all their wrongs upon their hands, and visiting his political outlawry upon slaves only. To accomplish which, he gives us a definition that begs the very point in debate; informing us that citizens are "*free inhabitants, born within the United States, or naturalized under the laws of congress.*"† Is it so? Does civil bondage take away citizenship? The question is in form one of words only, but there is some importance in deciding it correctly? Words have consequences. To shut men out of the pale of citizenship because they happen to be locally oppressed, is to add political to civil degradation, and so to aggravate their misfortunes; lending a sort of countenance to the wrongs they suffer; excusing the apathy of the general mind towards them; driving deeper the nail which has already entered their hearts.

Freedom, like slavery, is a thing of degrees. If then it be essential to the character of a citizen, how much of it is necessary, and how little can be made to answer? The people of the different states of the union are unequally free, and the inequality is considerable, as might be shown by a hundred illustrations. Yet all are citizens. And so are all the people of France, while half their presses are muzzled, and the public peace is kept rather by arms than by laws and magistrates. And so, if I may trust the language of French jurists of Lewis the Fourteenth's time, were all the subjects of that tyrant's reign. Here are great diversities. We may find yet greater by descending to particular instances. A man in jail for debt

* Chancellor Kent. † 2 Comm. 258.

has not much liberty left him, yet he is a citizen. The maniac of the asylum, under the discipline of a cell and a strait jacket, is less a freeman than a slave in actual circumstances, yet he is a citizen. It is conceivable that a person of sound mind and harmless morals should be locked up by private villany, fed on bread and water, and under peril of his life compelled to work a treadmill—a thralldom not easily paralleled anywhere; yet methinks the sufferer would hardly be cast off by the laws on this account, and made an alien to his country's institutions just because they fail for the time to protect him. Ruffianly abuse is not to be thus turned into a function of political sovereignty for denationalizing its victims.

On the other hand, if slaves are to be regarded as aliens simply because they are slaves, see how the doctrine clothes the master with a power of like nature for exactly the converse process. A freeman is a citizen, we are told, if native born. Very well. And how if not thus born? Why then an act of congress is requisite; a high prerogative of state supremacy must be exerted; the vice of foreign birth must be cured by naturalization. Yes, the constitution says so, and we may not contradict it. But observe, our slaves are all natives, bondage alone being the vice of their condition. Who can relieve them of this? Does it take an act of congress to do it? Not at all. Every master can emancipate his slaves, and thus take to himself the sovereign and august prerogative of citizen-making, for good or evil to the republic as may happen. Even so. An absurdity sufficient, one would think, to refute the fancy that gives rise to it.

Let us be more considerate. Enjoyed freedom, enjoyed rights of any kind, are *not* essential to citizenship; which consists in a man's being thus and thus *related to his country*, be his personal condition what it may. Relations do not depend upon

the measure of the advantages realized from them. Citizenship is a fixed idea. The rights that go along with it are political, rather than civil; for civil rights, in matter of enjoyment, fluctuate indefinitely, while that relation stands unaltered. Not even penal justice, though it often makes strange work with men's condition under the government, touches or can touch, save by the gallows, their political sonship. Banishment is none of our inflictions. As long as life lasts and home residence continues, the guiltiest felon cannot be taunted with having lost his country, however it may have lost his usefulness. The very convict in the penitentiary lives politically in the midst of his civil death. And here is the proof: he owes allegiance still, and is still entitled to protection. If he did not owe allegiance, he would be incapable of treason; and had he no claim for protection it would not be murder to kill him. He is therefore a citizen, however cramped in actual liberty, however prostrate in character, however abject in condition. It is relationship and not freedom, that makes a man a citizen.

Do not some authors allow themselves to be misled by vague historical recollections? It is true the Grecian and the Roman slaves were not regarded as citizens. But a moment's reflection gives us a reason for this that has no application to our times. The Grecian and the Roman slaves were not even *personal entities* within the notice of the laws. They had consequently no capacity for rights, or for the relations on which rights depend. They were legal nullities.

Person, under the Roman jurisprudence especially, was the all-comprehensive word of jural capacity. It took several things to fill out the meaning of that word. One ingredient was liberty or the *status libertatis*; another, citizenship or the *status civitatis*; a third, family connexion or the *status familiae*; and so on. These were distinct fractional portions of the law unit

person, with which jural notation, if I may so express myself, began. Liberty alone was not sufficient. Liberty with home-birth added, was not. Till a man could write himself a *person* complete, he was nothing.

And for that matter it is just so now. Yet there is a wide difference to be noted. Legal personality is not so artificially compounded as it used to be, and liberty in particular is no longer essential to it. We live in christian times. Our jurisprudence has been christianized. The laws do not wait till a man is free before they recognise him. He is a *person* now in all circumstances. And though in chains for the time, he has none the less capacity for rights or relationships on that account. His rights may be obstructed in some points, just as an innocent freeman may be wrongfully imprisoned; but he has still a country of his own, and is as truly within its liegeance as the best of his neighbours are. Our slaves therefore are citizens, however wronged and down-trodden. They have in them, at least, what the Greeks meant by πολῖται, as distinguished, not perhaps from μετοικοί, a sort of middle race between citizens and slaves, but from ξενοί, foreigners; what *cives* stood for at Rome, as opposed, not to the half-enfranchised Latins of the neighborhood, but to *peregrini* or strangers; what the French, even under their kings, call *citoyens*, in contradistinction from *aubains* or *étrangers*; in short, what *subjects* are in English polity, as contrasted with *aliens*.*

Nor is there anything inconsistent with this doctrine in the manner in which our southern servitudes are allowed to affect the representative weight of the slave districts in the general

* It is worth notice that Pothier, in the second title of his 'Traité des Personnes,' puts *regnicole* as the precise synonym of *citoyen*. Which seems a definition just to my purpose.

government. Men are often heard to talk of the representation of those districts as increased by the presence of slavery, in the proportion of three to five of its subjects added to the free population. If slaves were mere chattels, that would be true. But take them for persons, the same as white citizens, and what then? Does not the three-fifths compromise assume another aspect? Instead of its giving an increase of representation to the slave districts, it has just the opposite effect. Instead of making them politically stronger at Washington in the proportion of three to five of the slave inhabitants added to the free population, it makes a ratio of two to five, added in like manner, the other way; that is to say, they are so much weaker in the national councils than they would be were their slaves but ordinary servants, such as the constitution takes them for. So that while this document lends no aid to the oppression by which the servitudes in question are aggravated, its adjustment of the representative scale is actually of a nature to discourage that abuse. And if those immediately concerned do not see the matter thus, it is because they practically overlook the circumstance that slaves are men.

In a word, whatever violence is done in the country to the great principle of equality embalmed in the declaration of independence, it is civil, not political violence; local, not general; and the constitution is guiltless. I am strenuous in this, for it is important, and I say generally, that except the necessary dispatch of public business in some cases by a constrained service not otherwise to be had, and which is always without disparagement of personal rights, we have no *political* servitudes of any kind. Towards government, our rule of freedom is absolutely uniform. All the great liberties that have been enumerated—home-residence, keeping and bearing arms, access to courts and magistrates, the *habeas-corpus*, petition, speech and

the press, are rights of which no class, no individual, can be deprived by federal power. Arms, it is probable, will be denied to slaves as heretofore, by local enactments, and doubtless for sufficient reasons of local police. It has even been attempted to shut the doors of congress against the wants and griefs of the slave population by restraints upon the right of petition; but that project ultimately failed. The constitution is for all. It has no preferences. *Politically* the very slave is free.

8. I name one liberty more. And though it be one of which law-writers have taken no notice in this connexion, it seems to me the diamond of the casket. I refer to the right the people exercise *as authors and upholders of the common-law*.

The distinction between common and statute law is familiar to every one. In both the people may be truly said to govern themselves, but with different degrees of directness. They make statutes through the agency of the legislature, and judicial common law by the mouth of the courts; but the original concoction of the sentiments and customs on which the action of the bench mainly depends, is under God the people's own work in proper person.

Even as regards the agencies here mentioned, namely, those of legislation and judicature, the latter (contrary to vulgar opinion I admit) is much the more modest and safe of the two in its very nature. And if this can be made to appear, the people should be cautious how they suffer the common-law jurisdiction of the judges to be narrowed by legislative encroachment.

Legislative agents are appointed it is true for shorter terms than the judges, and come oftener and fresher from the bosom of society. But other circumstances more than countervail this. Their business, in the common understanding of it, is that of *making* laws, and making them at pleasure; a fearful office, opening an unbounded range of employment to those in charge

of it, and such as, if it do not turn their heads, is apt to put them in a mood of action rather speculative than heedful of precise exigencies, rather towering than prudent, rather bold than wise.

On the other hand the judges are but the laws' servants; declaring, expounding, applying them, as already existing and in force, without the least pretension to authorship in the matter. Here is a wide difference of function, and one that must have its influence on the views and characters of the functionaries. Judges are ministers of justice and of public order; ever healing the wounds of the social system, and never making experiments upon it, or putting its capacity of suffering to the proof by official games of chance. The longer consequently that they hold their places, the better; since their power of usefulness improves continually by experience.

There is a vulgar jealousy abroad against what has been the usual tenure of the judicial office, 'by good behaviour,' which it is grudgingly said, gives the incumbent a freehold, making him a judge for life. Yet how for life? Can it be otherwise than by his fulfilling the condition of that tenure down to the last moment? Would to God we had more officers for life upon those terms.

And what I pray is the tenure by which the power of legislation is held? I mean when it is held for many years in succession, or with occasional intervals, as may happen? Is it the same tenure 'by good behaviour,' so feared and hated in the men of the bench? Or is it *demagogy*? If the former, away with your jealousy; and if the latter, 'judge righteous judgment' as to the comparative safety of the law-making and law-executing functions in regard to the public liberty.

It is however upon no comparison of agencies that the question in hand is to turn. There are other points of view

to be taken. Judges are not the authors of the common-law system. Under God, as I have said before, its authors are the people themselves. They make it; they amend and modify it from time to time, in parts admitting of change (for there are parts that do not) and near all their liberties are more or less nourished and upheld by this means.

Let us be particular. The weight of the matter will justify it.

The common law consists mainly of two branches: one essentially *moral*, the other *customary*, or depending on *usage* for the obligation it imposes. Both indeed are evidenced by custom, but I call that moral which is such in its own nature, and not merely by the force of usage.

Now the people's authorship in what is here termed the *customary* branch, will be denied by none. Usages, resulting in custom, are frequent subjects of proof in court; and confessedly, when they are established by proof (no pre-existing law hindering) they have a legal force of their own, and judges have no choice but to give effect to them.

Instances of this abound at the present day, after the same kind of operation has been going on for centuries. Imagine then what a mass of rules have been thus added to this portion of our polity. One would think the whole stock of possible additions must have been long ago completed. The fact that the work is still in progress, only shows the infinitude to which the variety of human usages may extend. How much of our unwritten economy is due to this source, were hard to say. Certainly an immense proportion of the business part of it. Take a single head—the law-merchant for example, itself a world—and what but custom do we see and hear and breathe throughout its vast extent?

But how as to the *moral* branch of the system? What,

you will possibly inquire, becomes of the people's authorship here? and who but the deity can *originate* principles in morals?

Very true. The *elements* are doubtless divine. And for the purposes of the divine government, where the work of justice and judgment proceeds upon the evidence of the hearts of men directly looked upon by the all-seeing eye, and no machinery of courts and witnesses and ceremonial practice is employed, they answer perfectly without change of form. But our occasions are different. The civil state is not modelled after the simplicity of God's government. It is a complicated, and a comparatively clumsy contrivance of our own. Its economy is all human; neither instituted nor specifically legislated for by him. His legislation is for *men*, and not for *politic societies*. These he suffers us to establish for ourselves. They are artificial things. We make them what they are, partly by written constitutions, partly by statutes, partly by common law. As a christian people we naturally draw upon christianity for the ethics of the system. And in doing so we take just what the system seems to us to require; performing an office like that of the lacteals of the human body, which absorb and carry into all its parts the needed and congenial nutriment for keeping them alive and in health. The divine laws find their way into the body-politic through the popular mind, by an insensible absorption of their vital principles. Some of them indeed are unsuitable to its uses. Those of church observances for instance. The people make the selection however at their discretion. So far as they are free, nothing can enter into their economy but as it meets their approbation. If they were pagans, christian ethics might not answer their views. As christians, they certainly can never adopt or legalize the ethics of the heathen world. Whatever they are in their own

characters, the ethical character of their laws must correspond. They would not be free if it did not.

Will it be imagined that the courts act for them in these matters? They do indeed act for them, but they do it as servants and not as masters. The last point from which a nation of freemen can be driven, is that of judging for themselves in matters of conscience.

Besides, if the power were given to the courts, two incompatible jurisdictions would be united in their hands; rendering them, in more or less extent, the makers as well as executors of the laws they administer.

Some may find themselves embarrassed with the notion, too vaguely set afloat in certain quarters, that our common law is English, and so, not truly under popular control. The fact that the fathers brought much of it along with them from England may be readily conceded. Next to their religion they thought it the richest treasure they could bring. Nor did their value for it diminish afterwards, as the anxious stress laid in many of the early state constitutions upon the popular right of holding fast to it, may witness. Yet it soon ceased to be English as a whole. The plant was exotic, but it became by degrees naturalized; took well to our climate; and under a course of nurture in a republican soil fraught with the purest aliment of freedom, it put forth new leaves, new branches; grew all the better for having some of the old limbs lopped; till at length it became symmetrically and characteristically American, so that a Briton would be as loath to claim it now as we to part with it. Of its English substance much of course remained. Is that to our prejudice? Morals and customs, remember, make up its bulk. And what if a mere custom had its origin in a foreign land? Custom is a result of usage. If the usage be convenient, take the law thankfully

that upholds it. And if not convenient, drop the usage and the law together. The way is open. *Moral* laws, it is true, are not so easily put aside. But still, whether England preceded us in the use of them, matters not. The English are a christian people like ourselves. And what they have drawn from the very same ethical fountain that we drink at, must be alike healthful to both nations. Even if they have in any way perverted the truth, or mixed it up with things we do not like, the great standard is in our hands as well as theirs; let us correct their errors. The way again is open. It is one of the advantages of the unwritten polity, that truth and reason can always amend it where amendment is desirable.

I speak of *popular* truth and reason, not judicial. The judges can correct their own decisions, but it is not for them to alter the laws upon which those decisions are founded. They are ministers of justice; not fabricators of the rules which it is the business of their ministry to enforce. These, from the nature of the case, preexist. When once a judicial judgment is arrived at, it becomes a precedent, and has authority in the matter of future decisions. Yet how? Not as a law by itself; there is no pretence of that; but simply as respectable evidence of what the law is. And this evidence is confessedly liable to question. For as often as courts become satisfied upon reflection that a precedent is wrong, they set aside its evidence without scruple. This is every day's practice.

Many times, no doubt, decisions run into refinements which the people have no knowledge of, and are even incapable of understanding; much more, of originating. Such refinements however are in general but technical deductions from principles quite simple in themselves, combined it may be with peculiar facts, and peculiar notions of policy besides, suggested by circumstances. Any subject of knowledge, any subject of popular

opinion, may be pushed to extremes of artificial law, beyond the reach of common intelligence, while yet the people's right to regard it still as their own, and still to treat it so in practice, remains unaltered.

If I mistake not, the process of turning christian morals into common-law rules by the action of the universal mind, admits of easy illustration. Let us see.

The bible teaches us that selfishness is ever opposed to righteousness and justice; so that a man's well-doing under strong temptations of interest to the contrary, is seldom to be counted on. Common experience teaches the same thing. It is therefore a first truth in morals; but it is naturally wanting in legal form for purposes of civil administration.

Suppose two neighbours have a quarrel about a wrong sustained by one of them, and the question arises, who shall judge between them? Every one will say, not the wrongdoer; no, nor yet the injured party. Why? Because they are both interested, and liable to a selfish bias. This, all will tell you, is a disqualification. Go the rounds of the community, and you will get but one answer. It is the public sentiment. Shall we fly in the face of that? Impossible. What everybody forbids, is under effectual prohibition, and our ethical rule is now *legal*. Who has made it such? Not the deity. He furnished the elements only. Not the judges. They have not been called upon. Yet it is scored indelibly upon the popular mind, *that no man ought to be a judge in his own cause*; and it is part of the judicial economy of the land that he *shall not*.

The duty of *benevolence* is another first truth in morals. Men are bound to live for others as well as themselves. When no precise relations exist between parties, it is indeed a duty too delicate for human laws to enforce, for there is nothing to

measure it by ; we call it charity, and leave the principle to its own instincts. But as far as definite relations appear, and laws of civil constraint are possible, benevolence on one side becomes a debt due to *rights* upon the other, and so there is something for the laws to take hold on. What I ought to give to a beggar in the street, is a point of conscience which no magistrate can resolve for me. But what I owe to my family or the state ; to the corporation I am a member of ; to my master, servant, or the man I am trustee for ; these are matters of civil obligation which I must attend to at my peril. And though it be the law of love that should still govern me as a principle, yet if I do not listen to its biddings, other laws will speak to me in tones I may not disregard. Nor will their language be a mere reiteration of the second great mandate of the gospel ; it will rather be the substance of that mandate, drawn out into several forms of specific application, cognizable by the courts, as parts of the law of the land.

And how, I ask again, are we to explain the metamorphosis ? Take the single relationship of country, and tell me how the doctrine of compulsory allegiance grows out of it ; that is, by what agency. It is a common law doctrine, involving many specific rules of duty. But whence ? God is silent on the subject. And when judges sit in judgment upon cases of fact, they profess to decide *according to law*, that is, to some law in force already. And the very first case of the kind that ever came before them was decided in like manner. They *declare* the law, and make evidence of their understanding of it. That is all.

A man, we will suppose, is chosen overseer of the poor, and refuses the office. Upon application to a grand jury he is indicted of misdemeanor and the court punish him. Why ? It is a rule of constitutional common law, made either by the

bench or the people, that when a citizen is appointed to such a service he must render it whether he will or no. But the bench is itself a creature of the constitution, and can hardly be supposed competent to react creatively upon the source of its own being. The true law-givers are the people therefore. And there is no escape from the conclusion.

Indeed the fact that the common law is *unwritten*, settles the point for ever. If the judges made it in virtue of their special authority, it would issue from under their hands, not in the shape of judgments, but of *edicts*, which are necessarily phraseological, or couched in a precise form of words. A judgment binds *as evidence*, till it is found erroneous; but parties and privies to the particular case excepted, it *never binds directly as law*. It is to the law enforced by it what a commentary is to a text. And as the text and commentary cannot change places and retain their respective styles of composition, neither is it possible in the nature of things, that a judgment should take effect as a general edict, or a general edict as a judgment. The common law has therefore an essential distinction in being *unenacted, unwritten*. *Its philosophical locality is the public mind; its philosophical form, popular sentiment*. And thus the people's prerogative of making it for themselves, without agencies of any kind whatever, becomes intelligible.

But how, you will ask, do courts get at it then? In matters of custom, they get at it originally by proof of usage, and afterwards by the evidence of their own decisions on the subject. Where moral principles are involved, the christianized moral sense of the age and country, common to all men, is the universal interpreter in cases of first impression, aided however, in further progress, by the views these cases happen to develop. As to points of policy and art, which form the supplement of

this branch of legal science, judicial ingenuity leads the way, and case-law follows in train.

The sum is this. God gives us moral elements, but does not work them up into civil-law regulations. For settling these, men are left to be their own lawgivers—paying due respect always to the ethical principles of the divine government. And such is the congeniality of the rules of that government with the moral sense of mankind, that the people fall naturally into corresponding usages of thought, feeling, and action, in their social affairs, at the same time that these usages are diversified by a vast multitude of special adaptations, each resulting in a canon of convenience or duty for cases of a particular class. I say usages of thought and feeling, as well as of action; for in both, it is the general habit that makes the rule. What all the people think and feel to be right in any one of these cases, they are sure to regard as law for individuals; and if judges are invoked, they have no choice but to do likewise. Everybody's sentiment in the matter running one way, everybody's will goes spontaneously along with it; so that if the universal will can be converted into law by the act of a few delegated agents announcing it as theirs, much more ought universal sentiment to be regarded as law in points where it is still better known without that ceremony, being proclaimed by the infallible dictates of a common nature divinely instructed.

Having arrived at this conclusion (which, from the supposed novelty of the views explained in getting to it, I have used some length of illustration to prepare the reader for) I now proceed to my main object, its political bearings.

First then, let it be noted well, that while in the enacting of statutes the people's government of themselves is indirect, that is, by an agency of public men appointed for the purpose; on the other hand, *in making common law regulations their self-*

government is direct and personal, with no human voice but their own to say a word in the matter.

This, I take it, is an important difference. It shows the common-law branch of our liberties to be more decidedly *democratic* than the rest. And though the fact may be one of equivocal value by itself, there are things to be said in connexion that will relieve it of all doubts. Democracy is at least conceivable without its ordinary vices; and so far as our polity is of the common-law stamp, it is democratic in just the form of that conception.

What are the ordinary vices here referred to? Briefly, they are *demagogy*; *passionate, hasty, ignorant counsels*; and *instability*, as a consequence of these.

Now the people being their own law-makers in the common-law department, have there *no offices* to bestow. Demagogues are therefore out of the question.

And in doing their own work in that department, the people have occasion for only two kinds of knowledge, namely, what usages are convenient in business—a point they cannot help knowing from experience; and what are the great principles of right and wrong—a matter familiar universally to their moral sense. Of course, they will not abuse their power through *ignorance*. Nor are *hasty* measures possible in any bad sense, where conscience is the operator, its first decisions being commonly the best. Much less can there be a premature despatch in establishing customs by usage. And to speak of *passion* as likely to precipitate or prevent the judgments of mankind upon general rules of conduct whether in business or morals, as contradistinguished from specific measures of interest, were of course childish.

As to instability, the causes of it failing, the thing itself is unlikely to be realized; not to mention the historical fact, that

of all entities of a legal nature, common-law customs and morals are notoriously the most abiding; the statute-book being a sea of bubbles in comparison.

So that the democracy of the popular law-giving on these heads, is a thing of value without abatements; gold without alloy.

Secondly, although the common law as well as the statute-book must have judges to execute it (in which respect the scales are even between the two) there are dangers connected with the agency of legislation that deserve particular notice.

Shall we argue from the nature of things? The power of that agency is great, and extremely trying to the character of the possessors. Though men were as pure as angels they are not as wise. Nor can their purity itself be always vouched for under the temptations of such an office.

Shall we appeal to history? What but ambition of sovereign power, and the ruthless game of playing it off amiss, does history treat of?

In our own experience I shall attempt no specifications. The fact that the people's conservative care of the government has been hitherto directed in chief measure to the legislative department, tells its own story. I will venture two suggestions however in a general way: first, that we have sometimes seen congress under a dangerous presidential influence (the only state of things that can well exhibit the political executive in a posture formidable to public liberty) and next, that both congress and the minor legislatures are subject to an influence more dangerous still, from the ferocious workings of party-spirit, the attendant curse and usual destroyer of free institutions. These certainly are great evils. Nor can the electoral oversight be counted on in all cases for timely correction. When I add, that they are evils unknown to common-law

government, I am sure I make a statement that should draw attention to some of the reckless law-enterprises of the day.

Thirdly, aside from perils of the future, I affirm that men are *presently freer* under common-law regiment within its proper range, than it is possible for them to be under a substituted regiment of statutes. In other words, the common law sits easier upon their active pursuits. There is less friction of machinery. Indeed the common law works with no friction at all; for being a direct creation of the public mind, and that in the very matter of men's liberty, it fits their occasions exactly.

Not so with statutes; which are things of artificial contrivance, necessary to a certain extent, but worse a great deal than useless beyond that limit. Their working is uneasy and troublesome. Freedom suffers from them more or less according as they are well or ill conceived and adapted; but it always suffers, and not seldom more than is atoned for by the good they do.

Let two or three suggestions be weighed.

(1.) Statutes precede experience, while common-law decisions follow it; and the common law itself grows naturally out of numberless cases of fact, insensibly classified and reasoned from by an intelligent community.

(2.) Statutes being phraseological and confined to books, it is hard to bring them home to the familiar knowledge of the people; whereas the great principles of common-law justice have their very life-place in the popular mind. A difference of vast importance. For if the tyranny of *will-government* lies much in the uncertainty of its laws, a government by statutes imperfectly published is objectionable on the same account. To be subject to the penalties of a law unknown, is not law freedom.

(3.) Even when the details of a statute are made truly and

thoroughly public (no every-day event) they are not apt to commend themselves, as common-law judgments do, to the conscientious reverence of mankind. Another portentous difference. The citizen often finds his common sense, perhaps his *moral* sense, directly crossed by a statute regulation. When that happens, he is oppressed. And even where statutes put no force upon his conscience, he cannot feel the same regard for a page in the statute-book as for a living axiom in his own bosom; and his obedience wants the alacrity of spontaneous action. First truths in morals do not abridge his liberty; but written commands, that involve him in formal readings and constructions, may and must have that effect in some degree.

(4.) Statute government, according to the settled doctrine of interpretation applied to its laws, is a government by the *will* of the legislature; and puts the citizen upon a study of that *will* as the very essence of his rule of life.

This would startle us if we had not heard it so often and habitually in the forum as to have our freemanly sense of its political import dulled by the repetition. The legislative *will*!

We legislate indeed by popular agents, chosen for short terms. And these agents couch their will in set phrase, and publish it (after a fashion) before its legal character becomes practical. Still, as compared with the common-law portion of our polity, statutes govern *arbitrarily*; that is, by *sovereign precept*. And however indispensable this kind of government may be in the general system, let us have no more of it than we reasonably must. It has its place; but out of that place it is a mode of constraint less favourable to freedom, and, as I think, to public virtue, than the gentle rule of reason and principle at the common law.

(5.) One thing at least may be said of statute government; it is as *changeful and capricious* in its operation as will govern-

ments in almost any other form are wont to be. Who can deny this?

And instead of the evil being the less for the popular quality of the agents, and the brevity of their term of office, it is greatly aggravated by these circumstances. Look abroad. Is there a nation upon earth where the statute book is so exceeding frail and variable as with us? Our legislators from year to year are mostly new men, coming up from the people and going back to them again in a course of ceaseless alternations. Everyone in his turn does something for the statute book; and nearly everyone seems fraught with the amiable ambition of adding some whim of his own to the museum of its curiosities. To make room for his bauble, some other bauble must be removed, or a new niche cut for his accommodation. Changes of all sorts take place. Old things are done away, and if all things do not become new, it is not far want of diligence in the operators. At any rate, not a twelvemonth passes but the grand total has a multitude of features just put on, and has lost a multitude that were there in all their bravery a twelvemonth before.

And is this a book of canons for freemen to live by? Will it answer them in concerns of essential morals? Things morally indifferent may, if you please, be trifled with. Not so the great themes of the common law. Indeed, fluctuation of legal policy is everywhere a curse to popular freedom. How can a man be truly free who has to be continually on the lookout for legislative innovations upon the economy of his rights and duties? Will it not damp his energies? Will it not put his enterprise in check? Is not fear, is not suspense, a hindrance to everything in active life?

Upon the whole, the people's right to make law for themselves in matters of conscience and convenient usage, so far forth at least as they are generally and notoriously agreed upon

the subject, seems a right of great value, which no earthly consideration should induce them to resign. Their proceeding in the use of it has none of the infirmities, and incurs none of the hazards, of ordinary legislation. It is in the first place a business of detail, the tribunal of public opinion forming its conclusions, as the official courts do, case by case, and mostly in the very way of distributive justice. Ambition, speculation, are out of the question. Common sense, christianly instructed, does all the work, and does it by an insensible, but genuine induction of particulars, that scarce admits of error in the results. The judges, in the people's behalf, repeat the demonstration after them, and make learned evidence of those results, which therefore become visible materials in the great structure of the legal system; almost the only materials of a really permanent nature to be found in it.

And as might be expected from the nature and origin of the common law, this part of our economy is, in the second place, emphatically, and by contradistinction from the legislative will, *the law of freedom*. I say in contradistinction from the statute book. Let no man doubt it. Attempts are making in some places to have the whole common law *codified*, as the term is; in other words, *put all in statutory form*; taken quite out of the people's hands, and made over to the arbitrament of delegated power. God preserve us from so great a calamity. The people need no help but that of the judges in managing this part of their concerns. Nor is it possible they should give place here to the legislature, without incurring several dangers. Nearly all delegated power is dangerous, and ought therefore to be dealt out with a rigid correspondence of measure to the occasion for it. To surrender to the management of a few, things perfectly cognizable and manageable by the universal mind, were foolhardiness. The very morals of the

country are implicated in the question. For common sense, upon a point of morals, is moral sense. Law ethics, left to themselves, combine essentially with the ethics of God's government. They are things of conscience, and the cultivation of them in court practice promotes exceedingly the dominion of conscience over our civil affairs. Will you deprive the citizen of his common-law associations, and give him cold edicts of authority instead? Will you make his soul a desert, that you may write hieroglyphics of power on its sands? And bear in mind, your hieroglyphics will not stand the simoom of legislative invention. They must soon be obliterated, to make room for other specimens of law-making chirography, alike uninteresting to the common people, and alike transient. Oh, it is dangerous to go from fixed principles to ever changing forms; to give up the spiritualities of heart-citizenship for the dead ritual of a *corpus juris civilis* on paper. No doubt the common law, if you kill it and rest there, will revive again. But the recovery will be slow, and may even fail to give us back in the end the very life that was lost; for the revival will be more or less perfect, according as newly fabricated institutions harmonize or clash with its proper elements.

Besides, we have a practice of periodical revisions as regards the statute-book, that might be fatal to all hope of the people's ever regaining their common law position, should they once abandon it and allow the legislature to sweep everything into their jurisdictional vortex. A code, a book of statutes twenty times enlarged beyond its present dimensions, would render the revisory process yet more frequently necessary than now. So that the people will never see their common law again, if once they consent to let it go.

Will they not lay to heart then, that the law of their liberties is at stake? What considerable liberty have they, civil or

political, by legislative favour? Will you say the habeas-corpus? Nay, the habeas-corpus act is mainly declarative. The right it makes so much of is eminently a common law right. And it is not a little remarkable that our fundamental lawmakers, in dealing with a right like that, should have annexed it in one respect to the permanent jurisdiction of the legislature, by giving them an important power over it for the future, even a power of absolute suspension, in certain events. The case is worth remembering. Set men to legislate upon the right of petition, or of speech itself, and who can answer for it that they would not make a similar reservation?

The common law is better appreciated in England. I hope our undervaluing it has not arisen from that circumstance. Mr. Jefferson misconceived it altogether as *un-American*. More knowledge would have corrected his mistake. The British parliament, to their praise be it said, have generally treated the common law with due reverence since the tyrant dynasties expired; relieving it occasionally from embarrassments, but otherwise letting it alone. They know historically its natural relation to the public liberty. They know the public liberty was bred under its nursing care; kept alive in its arms, with every possible discouragement around, from the conquest to the revolution. All the great statutes of liberty in England are a kind of common-law statutes; the spirit of the common law was in them; as it was also in the popular mind; feeding the fire of that noble zeal, which at long intervals, hoping against hope, and gathering courage from adversity, forced their passage. English liberty is Saxon. And so is the English common law. They came down together, mutually supported and supporting, from the days of Alfred, who wished his people to be free as their thoughts, and nearly compassed the desire. By God's blessing, the two travellers made at length a further movement, and

came over the great waters, hand in hand, to cheer this western world. If it be true, as true it is undoubtedly, that Saxon liberty is the only liberty we know deserving the name, there is another truth worth treasuring up, and it is this, that such liberty has never yet been heard of but in companionship with Saxon common law.

CHAPTER VIII.

CONCLUDING REFLECTIONS.

If then a citizen were asked to give an account of himself in the matter of his freemanly pretensions, what would he say? What ought he to say? The inquiry is a grave one. I will venture a word or two of caution while it is upon his hands.

And first, let him see to it, that ignorance do not condemn him to stand mute. A people that do not understand thoroughly what liberty is, are neither worthy the blessing, nor likely long to enjoy it. I may say the same of individuals with very little qualification. Every one is bound to know for himself, and at his peril as a shareholder in the general stake of the constitution, the great principles of the polity under which he lives, especially in a land of popular institutions like ours.

But in the next place it is possible, as facts unfortunately show, to do worse than standing mute; for it is possible to misconceive the subject altogether, and so to talk idly about it; ignorance running into practical error; the blind leading the blind.

To avoid which, a number of truths should be well considered in the outset. Liberty is an *effect*, and not an independent essence; a *result of politic order*, and not an element of wild nature, older than society itself. Ingenious men may speculate as they will about the supposed freedom of doing as one pleases; of being under no restraining or constraining influences; with other figments of that class: the sooner we disabuse our minds of such illusions the better; they are mischievous.

Much less can we afford to follow them into the fantastic combination in which they have been sometimes represented as constituting a sort of barbarian headspring to the liberty of civilized men; to whom politic society is thought to be a means of preserving, *in part only*, a freedom enjoyed by savages in much larger measure, nay in perfect plenitude! To say of such a dream that it is false, is not enough. It stands in hideous contrast with the truth. Turks and Russians are freer than savages. And the evidence of the fact is flagrant—they *can do more with the liberty they have*. Is this denied? It is in vain to talk about “the state of nature” in such a connexion. *Naturally* (if that means antecedently to politic institutions) men are slaves. Such is my doctrine. It is the great office of government to emancipate them. See the operation. Government does in the moral world what the brooding Spirit did of old in the natural:—it brings order out of chaos; form, arrangement, harmony, out of an inconceivable jumble and perplexity of shapeless things. Despotic government itself does something in this way; I mean, brings some relief to the insufferable thralldom of “nature’s” anarchy. True, the relief is inadequate, and small thanks are wont to be rendered for it. Benefits which are very meagre in comparison with what they ought to be, pass sometimes for much less than they are really worth. And for aught I know, the little that a bad government does for its subjects, may serve by contrast to enhance the enormity of its failure to do more; just as a few faint rays of light, let in upon an abyss of utter darkness, will rather increase than diminish the seeming intensity of the night around, which they are too feeble to dispel.

Happily, all government is not despotic, arbitrary. There is such a thing as law and government united, consolidated;—an almost infinite advance of improvement beyond the rude poli-

ties of czars and sultans. Look at England; look at America. It is only necessary to name them. Here, at last, freedom stands forth in full dimensions. Here, a man is a man, and takes the port of one. Not surely as retaining more of the savage than is found elsewhere, but precisely for the opposite reason, that he is clothed with the securities of a thoroughly regulated public order, and is thus become enfranchised to a degree of which the children of the forest never dreamed. His powers and activities are set at large; may go where they will, do what they will, unhindered. He must not wrong his neighbour to be sure; he must not cripple, sequester, or dishonour himself: but within the bounds of reason and good morals (which it is always license and crime, not liberty, to transgress) he may attempt anything, everything, and compass all that his abilities are equal to; fearless of lets and jostlings from his fellow men, whom the laws are sure to punish if they molest him. In a word, he is free; and it is an advantage he is debtor for entirely to the legal securities with which he is surrounded. The laws, the laws, are his emancipators.

Away, therefore, with all speculative fancies which are calculated to impair the popular sense of obligation to the laws of the land. Next to God and revelation, law-government is our greatest benefactor. And it is well to bear it in mind. We are not like to love our institutions too much in any aspect of their merits. And it is leading us grievously astray to tell us, that instead of owing to them the very existence of our liberty, we are only to regard them as putting that liberty under divers curtailments and limitations foreign to its natural state. The government of America may not be perfect; though I believe it is as nearly so upon the whole as it will ever be, or indeed as the infirmity of human things allows. Grant however that it comes short of some men's notions of attainable perfection.

Well, how are we to think of this shortcoming? As a positive offence?—a criminal perpetration? Supposing the constitution fails to make us altogether as free as we could wish, are we thereupon to say, it robs us?—takes from us a freedom that we had before?—degrades us from the palmy “state of nature” by gratuitous disfranchisement? And shall we tread the paths of our allegiance in the spirit of these accusations? Much more, are we to carry such a spirit into the portentous business of so-called *reform*, with which the country is continually agitated from end to end?

The premises are wrong, and the conclusion wrong. The constitution *gives* only, and takes nothing away. It is civilization, it is government, it is law, that endows us with the liberty we enjoy. Let us remember where to pay our thanks. And when that fearful business of reform comes up again (alas, when will it be suspended?) and the body of our constitutional polity is again doomed to surgical treatment (alas, when will its wounds be long enough unscarified to heal over?) I have one prayer to make to him who may chance to hold the scalpel:—*Parce, precor, precor!* the flesh under thy hand is *parental!*

But let us assume for the present that our accounting fellow-citizen starts right; in other words, that he is under no mistake as to liberty in its essential character and origin. The next thing to be thought of is its outward bearings, and the proper demarcations to be drawn in its practical map.

Two epithets are currently applied to the subject. It is called *civil* liberty, and it is called *political*. This is often done, as if the words were interchangeable; which they certainly are not; the former denoting properly a relation of man to man in society, the latter, a relation of individuals to government, to the constitution, the state.

Now it is worth while to consider which of these aspects of the subject is primary, which secondary, in the freeman's account.

It is not unusual I believe for warm-headed politicians to speak of freedom in reference to the state only, or the constitution, as if all the interest of the subject lay there. The common cry is, government, government, government. A clamour not indeed to be complained of as asking more attention to political topics than is fairly due to them, but which is attended with this ill consequence, that it leaves comparatively out of mind a great mass of civil concerns which are in truth more immediately and deeply, though less conspicuously interesting to liberty itself. The bulk of men's affairs are civil, not political. Their freedom, which in a land like ours is ten times interfered with by private persons for once that it is wronged by public power, resides mainly in their private relations and intercourse. And when this intercourse and these relations are duly taken care of by the laws, the great end of government is answered.

What then, it will be asked, are our political rights good for? I answer, to stand guard over those that are civil, and to make government do the same. Government is a *means*. The rights of the people in and towards it partake of its subsidiary character. If men were what they ought to be, the whole stupendous apparatus of state power might be laid aside. And we should then be actually freer without government than it is possible to be by its aid; for instead of clutching here and there an imperfect measure of judicial protection, we should have a shield of universal innocence around us making such protection needless.

As matters stand, government is necessary, laws are necessary. And they are necessary to the very end of making men

free; being the only substitute we have or can have for the security which an unfallen condition of humanity might have brought down to us had God so pleased. Perfect love casteth out fear, it is said; and I believe the observation would be found as true of communities as of individuals. Wanting that heavenly specific for our social ills, there is no help for us but in politic institutions; which of course are all-important. The political rights of the people have a corresponding value. These rights and those institutions harmonize exactly; being parts of one immense auxiliary system, which contemplates the peace and good order of civil society as its main ultimate object.

An instance will show this more clearly. Among rights that bear upon government there is none probably that has made a greater figure in the world than what is called the *habeas-corpus*. Yet what does this amount to by itself alone? Is there any notable enjoyment in being carried passively before a magistrate, and there made party to a litigious question of discharge or imprisonment? I should think not. The use of this bald ceremony lies altogether in its subserviency to a right beyond it—the right, I mean, which every guiltless freeman may challenge, of being at large, and subject to no question at all.

Here then is a great civil right, with a political one of note in close attendance upon it. Weigh them together. Which is the heavier, which the lighter; which primary, which secondary, in the concerns of freedom?

Try the same question on a broader scale. We can resort at pleasure to the courts of justice, not only to get rid of wrongful restraints upon our persons, but for all manner of injuries whatsoever. This too is a political liberty. And a fine specimen it is of the class; none worthier of notice. Well, is

law-strife a blessing independently of results? No, but like some nauseous medicines it is a necessary evil; and we must take it for the good it does; the health of the body politic cannot be otherwise preserved. It serves admirably the purpose of a cathartic drug; working off the bad humours of the social system, cooling its fevers, and saving it from otherwise inevitable convulsions. A man we will suppose is slandered. If not allowed to litigate for redress, he will do worse. Or say, a right of property has been invaded, or a contract broken. The same alternative. Every imaginable form of grievance, constituting what is termed a "cause of action," may be added to the list of possible occurrences that tempt mankind to drag each other into court, or should that resource be cut off, to disturb the public peace with a much ruder style of controversy. And in all these cases, two descriptions of rights come into view. Can there be a moment's hesitation in deciding the point of superior weight and dignity between them? On the one hand, we have the right of character, of property, of social faith, and the like—things substantively valuable in their own nature; on the other, the right of putting ourselves upon the laws for protection in those several particulars—a form, a ritual.

I go further still. The part the people have, as electors, in the very functions of the constitution, stands as certainly, though not quite so obviously and directly, in the same relative subserviency to their ordinary civil interests. For I affirm no paradox when I say, that the far-famed privilege of voting at the polls, high as it looms in men's imaginations as a form of sovereign power, has no value by itself, none at all, but is utterly worthless, save in its bearing on the agencies of government, and through these upon the laws and other instrumentalities by which those interests are regulated and pro-

tected. Many persons talk about this franchise as if it were a political staff of life. And so it is, but not in the ordinary sense of the phrase. Let us not be children in matters appertaining to manhood. The electoral sovereignty draws vast issues after it no doubt; and yet it is useful *only as a means*. It helps to keep government in order, and government itself is but a means. So that the voter's privilege is in truth *a means of a means*; spending all its force upon a complication of machinery, which in turn works only (or should work) for the people *as citizens*, and not as politicians; exhausting its energies upon interests that are mainly (not to say exclusively) private. Even the international duties of government come at last to this in their legitimate intent.

Let no man therefore say that he is free, because he is an elector, and has thus a voice in the concerns of the country. The remark may be colourable as far as it goes, but it goes not far enough. Neither will it be sufficient for him to say, that he is conscious of no defect in any one feature of his relations to the commonwealth, whether as elector or citizen. He has still got to the shell only, not to the kernel of his freedom. Is it not a possible thing for him to be politically free, and yet fall grievously short of the mark in his civil relations? More especially may not a man *imagine* himself thus free, while in his private affairs he is miserably straitened by relative insecurity under the laws? And this is really the test point of the case. Some persons take for granted they are free, because the government they live under has a popular frame, as shown in this matter of the electorships. But is the conclusion warranted by the premises? History does not say so. Experience does not say so. We need something more than mass-voting; something more than any imaginable collection of popular axioms digested into constitutional formulas of free

government. Such a collection may not after all be large enough. It may omit some principles that are vital to the design. And whether it do or not, it is but a compound of means, the success of which depends not only on their own variety and fitness, but also on the discreet and faithful use to be made of them in practice. Government must be well managed, or it will not work well. It must be fairly married to its ulterior objects. Nor can such a thing as a freeman be born till that marriage is consummated. The course of nature does not permit it. And it is because so many constitutions are allowed to live single (if I may so express myself) and are just doted upon in their abstractions, and without the requisite practical adjustments and combinations to bring them into honest contact with the wants and occasions of society, that there is such a profusion of political bastardy in the world.

For illustration I will suppose a republic with a very weak, corrupt, or otherwise bad organization of the judicial department. Such a government could not last long perhaps, but it might exist for a time. Supposing such a thing, must not the liberty of the people be very imperfect? Politically they may seem to themselves well off. The suffrage is universal; arms are in every one's hands; the right of suit is unimpeded; everybody may petition for redress of grievances; and even the press is constitutionally free. But then a shrewd question arises: how does the citizen get along with his neighbours? For if he is in hopeless difficulties with them, what is life worth? What can he accomplish in the way of progress? To what enterprises of prospective advantage can he give his mind? What fruits will his liberty produce?

To be yet more explicit, the judges, I will say, are block-heads, incompetent to their duties; or there are but half enough of them; or they hold office by a low, degrading

tenure; are poorly paid, dependent, accessible to personal or to party influences; or they are openly venal; so that there is no certainty about results, but everything is unsteady, wayward, calculated rather to unsettle than to compose the social order. Pray, of what account is the political right of appealing to the judicatories in these circumstances? The right itself may be untrammelled, for that the courts are open, with process for all occasions, and every man can drag his adversary to the place of contest; but without a reliable probability of bringing matters to a just conclusion, is it not in vain? Controversies are not healed; the breaches in the social edifice are not built up; dilapidation goes on apace, and with no adequate means of repair at hand to keep off the approach of general ruin. The very end of government in this respect (and what other final cause does it exist for?) fails. In my poor judgment liberty fails with it. To talk about the political right of going to law, when the civil one of thus obtaining justice against wrong doers cannot be relied on, is idle. Until both these rights are secure, the citizen is not truly free in reference to either.

And this truth covers a great deal of ground. Judicature is a grand feature of free politics. It distinguishes the land of freedom from that of slavery the world over. Power is naturally a tyrant everywhere. It is only by judicature, an intervening agency between power and the people, independent of both, that tyranny can be held back, and popular freedom rescued from the lions. It is the bench, it is the judges, in every well regulated state, that stay the oppressor's arrogance, and temper the winds to the shorn lamb; at the same time that on the other hand, the license of the multitude is repressed, and general order maintained.

Go to Russia and attend the great autocrat's tribunals. Are they really judicial? Do they form and utter judgments of

their own? or are they simple conduits of the imperial will, giving forth the very same elements that are poured into them from an unseen source, and like the statuary of a Paris fountain, imparting neither taste nor colour, much less a healing virtue, to what they passively disgorge? This is not judicature. It is not an intervening agency in any dignified sense of the phrase. No, it is a make-believe; a stalking-horse illusion. Honest judicature, instead of pandering to imperial caprice, would thwart it, would go between it and its victims, would establish rules of justice for the throne itself, and would change in time the character of that throne, to the unspeakable advantage of those who bow before it. With a thoroughly independent bench, and a Saxon force of precedent for its decisions, there is not a polity on earth that could long remain arbitrary; public sentiment would mature gradually into common law; and common law is ever on the side of the people, from the very fact that it originates in public sentiment. Under the cover therefore of true judicature, liberty, though it were dead, would come to life again, and despotism, though the lives of forty giants were in it, would consume away and die.

Go next to England, at the opposite pole of the political world. And when you get there, take up the annals of the past. There are lessons in those annals worth the reading. It is especially edifying to compare the state of English judicature before the revolution of 1688 with its subsequent condition; the age of judicial dependance, truckling, and venality, with that of the glorious tenure by good behaviour.* And there will be profit in comparing the corresponding ages of popular liberty in the same country. How striking the parallel. How full of instruction.

* This tenure had indeed its commencement in the former period, but too near the close of it to develop consequences maturely.

Go finally from England to France; from the mixed monarchy, where wise laws are faithfully administered, and the people are consequently free, to a republic of great pretensions in regard to liberty, but whose people fall exceedingly short of the condition of British subjects in that respect, and for reasons not at all mysterious, though some are more obvious than others.

I conceive one of these reasons to be, that in place of a popularly apprehended and felt common law, the French are governed by a bevy of written codes. I conceive another to be, that instead of judges independently endowed and stationed, full of the fruits of life-long study, and shrouded with a dignity too stern for all sinister approaches, they have a bench organization and a plight and tone of character in those who belong to it, from which our notions of propriety recoil as from things of ill omen.

True, there is still in France a *semblance* of common law, if books of cases and commentaries without number in relation to the codal system can suffice for that. But it amounts to nothing after all, when we consider that our Saxon rule of *stare decisis* does not meet the approbation of French lawyers, but is utterly rejected by them; so that they are always afloat and at sea in their discussions, and not a foot of common law *terra firma* can be found in their tribunals. Especially have they no *jurisdictional* common law; no *substantive economy of principles and customs*, formed in the general mind and habits of the country, and sacred to its affections, as in England and America. And here is the strong peculiarity of the case. A common law of mere codal interpretation, admitting it to exist, would be rather judicial than popular; a matter of bench refinements, to which the community at large must needs be strangers.

Of French judges personally I desire to say nothing. Even of their office as at present administered I would rather the

reader should become an observer for himself. It is a subject of daily exhibition, easy to scan. And when he shall have glanced an eye upon the general aspect of things, and seen how matters look around those arbiters of justice in their private walks, and what sort of *accessibilities* they have sometimes to contend with, I advise him to be a looker-on at one of their state trials, and mark how prisoners are treated at the bar, how witnesses are examined, how rules of evidence are understood and applied; in short, how the most solemn things are made ludicrous by strange experiments, and tragedy and farce play hide-and-seek, upon occasions where issues of liberty and slavery, life and death, are depending. All this in a land raving with theories of political freedom! It shows what such theories are worth. Where practical judicature is very imperfect, and the people unprovided with a common law of their own, freedom of any kind is rather a name than a reality.

Some politicians seem to take the founding of states for a very small matter, and to think that they have only to get by rote a few maxims of constitutional politics, in order to proceeding at once doctors of the science, and ready for practice. But the case has points which escape them. Self-evident assumptions do not go beneath the crust of the subject. It is easy to affirm, for instance, that all rightful power is of popular derivation; but this settles nothing. It is easy to affirm, that the people ought to have a voice in the management of their public affairs; yet still we are practically no wiser than before, since it is plain they may participate in that management with more or less advantage according to the method to be adopted for the purpose—a thing that may vary indefinitely. Circumstances too are ever varying. The people, to act their part well in one form of free government, may require more knowledge than is necessary in another. In all, however, they must be

intelligent, or their governing faculties will be little-worth. Besides some general knowledge, they must know the frame and genius of the particular polity they have to do with. Definitions are not enough. A few postulates of general truth are not enough. They must understand the working character of the system. There are matters of great moment which they will have to ponder once and again, before they can proceed safely and prudently with their governing enterprise—even in a thoroughly checked and well balanced republic. Men are too apt to be satisfied with a smattering of trite and worn-out generalities; such as that the people are the true sovereigns, that government should be mainly organized by popular elections, that rulers should in general hold office for short terms, and several more, alike vague, alike useless for any precise end of actual statesmanship. These are mere rudiments at the best, and lie upon the surface of the subject. Yet we have seen whole commonwealths set up the business of constitution-making upon a capital of some half dozen ideas of this class. Such enterprises cannot prosper. Men must carry their thoughts further, or their presumption not so far. Theoretical politics is one thing, applied politics another. For the former a few abstractions may suffice to some intents; but when the latter is undertaken, there are several branches of pretty profound study to be prosecuted in the concrete: there is a study of social elements; a study of degrees and proportions as to means and ends; a study of combinations and appliances. And here lie all the difficulties. One reason why so many experiments of free polity have miscarried is the very limited views that have engrossed the attention of those who have tried them. Men go wild with the mere gas of speculation. Pope's proverb, that "*a little learning is a dangerous thing,*" was never more brilliantly illustrated. Giddy with a smatter-

ing of republican first truths, it is not uncommon for political adventurers to overlook the connexions between constitutional forms and practical jurisprudence; between the organism of the means, and the very end to be accomplished. They do not seem to be aware that they have any concern, as state-founders, with the civil interests of the country affected by their labours; nor to bear in mind the important verity, that a political system, though government organization be alone its direct and ostensible object, has yet as many remoter but real objects beyond as government itself can have; so that to work well, it must *virtually* ramify to infinitude in the way of particular bearings. A shortsightedness like this must generally be fatal to the system that displays it. What better can be looked for? Suppose a student of anatomy should attempt to fit himself for surgical practice by attending only to a few central arrangements in the economy of the human frame. In studying the system of blood circulations for example, he thinks it enough to observe the structure of the heart. Will that suffice? Or if he go the length of tracing out the larger arteries, is this itself sufficient? Of what avail are heart and arteries together, without veins also? Must he not carry his investigations further, or expect to see his patients perish under his hand, for any skill he may possess in treating this department of their physical nature?

During much of the revolution of 1789 in France, the people of that country thought themselves in fair relations with the government. They had no habeas-corpus to be sure, and no Anglo-Saxon jury system. But they were not aware of these defects (with others that might be mentioned) as such; nor have they since gone far enough in the philosophy of freedom to make the discovery. Their theory of liberty was a very lofty one. It was a theory of political axioms of the first

degree; and could not stoop from its perch in the clouds to behold the things that were upon earth in the shape of social realities and social wants. Society, in its vulgar aspect, was hardly thought to need anything at the hands of constituent power; save only (the exception was no trifle indeed) a single edict of assimilation, by which its millions of members were reduced to a common level of equality—all generalized into a mass of human heads in one vast horizontal plain, each ear to ear with its neighbour; and none presuming to lift a scalp above the rest, but under peril of having it cut off. Thus much, I own, was done for the people in their capacity of social beings; thus much, and little or nothing more.

Nor has the revolution of 1848 (if we may credit the autobiography of its self-célébrated hero) been conducted upon much wiser or more practical views. Two things appear to have been relied on as sufficient to accomplish everything for everybody in this movement. The state was to be divorced from the church; that was one of the regenerating measures; and universal suffrage (*"l'avènement des masses au droit politique"*) was the other.* The first was undoubtedly a good thing; but the last, in my poor judgment, was a door of bedlam set open. Think of it; universal suffrage in a land where not one in a score of the inhabitants can write or read! And this it is to make republics upon a grand scale of theoretical ideas! No matter what the social elements to be provided for, we must have a republic of the first water whether or no; and then, if it do not suit the circumstances of the people, why the fault will be theirs alone!

The sober truth is (will the world ever believe it?) that the

* Lamartine's History of the Revolution of 1848.

successful working of a government depends a good deal more upon practical bearings and adjustments than upon birdseye speculations. Its general politics ought if possible to be right, and must not be wrong in any vital points; but its positive institutional arrangements tell the story of its merits better than anything else can do; for these take hold upon the solid interests of the body politic. Constitutions are not indeed to be confounded with civil codes. They are essentially political and organic. Yet they have an ulterior design towards the social system, and they should be so framed as to answer that design. Speculative truth and statesmanly wisdom are quite different things. No science can be named to which outward circumstances are so eminently important as to that of politics.

Why do men forget this? Why, in course of history, do nations so often sing and rejoice the very moment the shackles of a bad government are thrown off; as if they were thereupon free beyond a question? The triumph is premature. The getting rid of those shackles is but a small part of the business. Were the people of France free the moment the king was slain? Suppose a thousand of them had been inquired of as to the true nature and ingredients of their boasted liberty, what testimony would they have given? Probably nine hundred of the thousand would have answered mimetically by a toss of the cap. Or if vocal signs had been used, the meaning would have been about the same. The people's hearts were full, but their heads were empty. The political mob-cries of the hour embodied near all the information that was afloat. And as for freedom, it was to them a word of delusion—a name which returned an echo of mockery to every voice that uttered it. Freedom was impossible in such a “state of nature” as that. Could savage life itself have

furnished a scene more vividly, more picturesquely savage? Was not every man afraid of his neighbour? Did not rapine and murder knock at every door? Were not all men's faculties for useful exertion paralyzed? King Louis was dead, but King Guillotine fared sumptuously every day. And no mortal could tell but he might feast the royal monster's gluttony the very next hour with his own blood. Is it not literally true, that when the Napoleon despotism succeeded that of fear and the gibbet, the people hailed the event as a *relief*, a *deliverance*, and actually found it such!

And here we have a notable illustration of the fact already suggested, that the two parts or kinds of human liberty, namely the civil and the political, are not necessarily enjoyed in any uniform proportion to each other. The proportion varies indefinitely, though, as I think, with a general tendency back to equilibrium. The French, under some of their revolutionary governments, stood infinitely better in their seeming relations with the commonwealth than as among themselves; whereas, under the tyranny that followed, and by which the republican drama was wound up for a season, just the converse took place. Civil laws, civil judicature, civil security (the parents of freedom everywhere) revived exceedingly under Napoleon, while the very shadow of *political* liberty was chased from the realm. And it is because civil rights are more directly vital to the general welfare than those of a political nature are, that the strange barter of a republic for a despotism was so readily and cheerfully made by the people of that country. Anything is preferable to civil confusion. It is possible for the grace of a despot to put men's private affairs upon a tolerable footing of freedom, while not a vestige of political liberty remains; and this is better upon the whole than the most plausible show of freedom as between the

people and the state, with distrust, and anarchy, and strife, in all their civil relations.

Discriminating therefore between the two great classes of our liberty rights, let us bestow a moment's separate attention now upon each; beginning with the civil, as at once the primary and the chief branch of the subject.

A right of the class referred to looks, it will be remembered, to the doing of something, as distinguished from mere effort. But it does not follow universally that he is freest who can do most; because his power of doing may result in part from a rate of physical or mental faculties beyond the average measure of endowment; whereas a weak-minded and weak-bodied person may be as truly free as any other under the laws. The freedom of the citizen as such depends upon outward facts. Laying therefore men's natural peculiarities out of view, the matter will stand thus: *that the more a citizen is enabled, by the actual state and circumstances of the society he lives in, to accomplish with a given rate of faculties, the freer he is.*

And this operative ability, this power of achievement, involves a combination as I think of two advantages: one, a more or less extended range of convenient and desirable *objects of pursuit*; the other, *relative security and facility* in the prosecution of those objects. The latter is the principal thing, but the other has also its share of importance.

We thus see at a glance under what auspices we are freest in our relations to each other.

Civilization, knowledge, art, trade, whatever widens the field of human husbandry or enhances the variety and perfection of its products, is directly favorable to liberty. A man who has a hundred options is surely more at large in point of enterprise, and has a better chance of successful employment, than if he were tied down to one. I take this to be liberty, and in a

very fair, though possibly a somewhat unusual application of the term. I take it to be a form of liberty resulting moreover (like everything else in that category) from law and government, as its original though not immediate source.

But let us next suppose the number and variety of options (that is, of eligible objects of pursuit) given. The man will then be freest who shall employ his energies upon them with the best external opportunities and facilities; in other words (for it comes nearly to that) with the fewest hindrances and burdens. In which respect, the evidence is flagrant, that government and the laws (with judicature, to vitalize their influence) are the grand liberators. Would that the people may esteem them such. It is a magnificent truth. False theories have too long interfered with its sway. It is time for the public mind to right itself in the matter.

Upon the whole, then, the liberty of a country will be in the compound ratio of the two advantages that have been mentioned. And of all communities, that one may be regarded as freest, which is farthest advanced in liberal culture and improvement; in science, letters, arts, refinement, taste; and at the same time, is best governed: the former fact availing to diversify and enrich the options of life to the greatest feasible extent; while the latter throws the most effectual securities and aids around the prosecution of them.

Of our American grade of civilization, I have no occasion to say much. We need not be uneasy on that score. Young nations, it is probable, are generally less improved, as they are always less polished, than older ones. But a new state formed by immediate derivation from one of mature standing may and ought to be in some measure an exception to the rule. Among the nations of the eastern continent, I cannot doubt that England is first by many degrees in the scale of improve-

ment, all things considered. France may have the advantage in some points, but England, as a whole, is far before her. The single difference in popular education and intelligence settles this. I thank God, we are come of English descent. And we are come, Minerva-like, not from the womb of the parent country, but the head rather; not in infantile imbecility of mind and body, but full-grown and well instructed; not with a character to form, but ripe already in the views and principles and habits implied in our genealogy, and which will be its glory to the end of time.

In one respect we may be said to be better off than England herself. With about the same number and variety of avenues in which to find employment, we are less crowded and jostled in making use of them—a temporary circumstance indeed, of which time will deprive us, but which, while it lasts, enables us to breathe and act the more freely, and with better results than might otherwise be possible.

If then the further fact can be added, that we are also *governed* as we ought to be, our case will be truly a happy one. Let us consider it briefly in this point of view.

The doings of mankind, as we have seen, fall naturally into a fourfold distribution; they are selfish, social, religious, political; these terms indicating with sufficient certainty the several bearings in which all human activities are wont to be exerted. Our freedom, of course, has corresponding aspects; being a freedom of individual pleasure-seeking, of business in its various forms, of conscientious duty towards Heaven, and of dealing with government (alike for its advantage and our own) in the full jural latitude of our relations with it, whether as citizen-subjects or electors. The outline is short, but comprehensive. And to determine our plight as freemen in a thoroughly intelligent manner, we should study every part

of this outline. The eyes of the free must be wide open. No department of their liberties can be safely overlooked. A people may be quite at large in one field of their concerns, or even in several, and yet be miserably straitened in another. The department of religion continued long a field of comparative slavery in most European countries, after considerable progress had been made in some of them towards secular emancipation. The freedom of men in their relations with the state, has also lingered in many cases far behind what they have enjoyed in their affairs of business or amusement. And we have before us the distressing fact, of several millions of persons blotting the fair landscape of our own America with sights of civil thralldom, while yet, politically speaking, they differ but little from ourselves. Everything therefore should be well examined. The condition of a country is a compound result. It is not enough that *portions* of the people are free. It is not enough that all are free in *some* of their relations. To be free in the large round sense of the term, they must be such without exception of classes, and without stint of relative bearings.

Their freedom, in the matter of it, will import, in the first place, the personal element of local selfcontrol, or the right and power of every one to go where he will ; abroad, or within the utmost bounds of his own country ; for ends of which he is sole arbiter ; and without impediment or question from any human being.

Secondly, it will import, that the citizen be under no manner of embarrassment in his selection of the line of life he is to follow, so that he may spend his time and employ his faculties in the way regarded by himself as most favorable to the pursuit of happiness. It is in vain that the progress of knowledge and improvement has developed an unheard-of multitude of options among which to look for what is best to do or set about, unless

the range be fairly open to individuals. This therefore is another point of vital interest to every economy of freedom.

And lastly, whether a man's line of action be pleasure, business, or religious duty (politics may be dropped from the enumeration here, to be separately noticed afterwards) he ought not only to be permitted to do all he can, unhindered by those around him, but to be positively encouraged and assisted by government, so far as this is feasible, and consistent with the general welfare. Individuals cannot indeed, to any great extent, be singled out and made objects of personal favour in the management of public affairs. Men's interests must in general be classified, in order to being legislated for. But the several departments of applied liberty, to which those interests belong, are neither so numerous that any of them need on that account be lost sight of by government agents, nor so inconsiderable as to allow of their being innocently treated with neglect. On the contrary, they must all be diligently taken care of, or our freemanly condition will fall short of the mark. Security, liberty, and property, are the triad of classified rights, for which alone laws are made and government exists. And when it is considered that security is one main point of liberty, while property is but a product of liberty in its business applications, the proprieties of the case, as between public power and the freedom of the citizen, appear in strong relief.

This freedom however, let it be repeated, is not the thing some writers and a host of noisy declaimers represent it to be. It is not an absolute principle. It has its *barriers*, beyond which it may not pass. The laws of nature, the laws of christian morals, are such barriers. To the former few persons are insensible: the latter often need the help of judicature to make their presence duly felt and respected. Beyond the barriers, liberty is not itself; it is another thing entirely, and has

another name. And no matter how it gets beyond them, it is a wanderer and a vagabond there; and would be, though it had a government passport to shew for its aberrations. True liberty can never go further than a clean conscience can go along with it.

The citizen must remember also (another repetition) that there are *burdens*, and pretty heavy ones, which it is no disparagement of liberty to bear; such as serving the country in certain undesirable offices, paying a portion of its necessary taxes, and submitting patiently to the frequent inconveniences and occasional losses incidental to crude and blundering though well intended legislation. Civil and political order being the life of liberty, the unavoidable evils connected with the maintenance of that order must be borne with.

And when the just limits and qualifications of a freeman's rights have been duly noted and allowed for, the topic of his probable *wrongs* and *dangers*, with the power he has of warding off or redressing them, will claim attention. This is a vast concern. There is hope that he may learn from it how exceedingly dependent he is for whatever liberty he enjoys, upon government, upon the laws, upon judicature. For against wrongs and dangers he can have no other shield. His freedom will therefore be very exactly graduated by the protection and encouragement afforded him in the several fields of action that have been referred to—his amusements, his graver ordinary affairs, his allegiance to the king of kings.

Such is civil liberty, as distinguished from political; and such the method of survey by which, as I conceive, its actual state and measure of existence may be studied with advantage.

Political liberty, which I proceed to notice, in conclusion, by

itself, has some peculiarities about it that deserve to be mentioned.

The rights suggested by this topic being of a secondary and ministerial character, I remark in the first place, that they fulfil their office of subserving the civil welfare of mankind, with more directness of bearing in some cases than in others. Of the eight rights in particular that have been prominently brought into view, three, namely, the right of remaining in the country, the right of access to the courts, and that of the habeas-corpus, inure to the immediate benefit of individuals; taking full effect, as cases of practice arise, without any circuit at all. The same may be said of the right of petition, when employed for the removal of private grievances; though when the grievance is public and general, the effort to get rid of it has a corresponding drift in the first instance, and the effect is only brought home to individuals through society at large as a medium. The other four rights—being those of keeping and bearing arms, speech and the press, equality, and the popular framing of the common law—bear first upon government, through government upon society, and through society upon individuals. In which respect the great functionary franchise of the polls may be referred to the same category, for its operation is exactly similar.

That these enumerated rights are but a portion of the class they belong to, will occur to every one. They are the more obvious and striking specifications, that is all. Constitutional bills of rights, as we may see by turning to the performances of our own country in that line, are wont to add largely to the detail; the numbers varying, in different states, from perhaps ten to about forty. Nor is any one of the enumerations large enough to embrace all. Not one, if I remember correctly, includes the popular framing of the common law,

as any way belonging to the list. And there are other omissions, not a few ; though we here and there detect rights that are properly civil, nestling among the generally political brood of the recorded ones—a little ludicrously out of place.

The truth is, political rights, depending as in part at least they do, upon the kind of government which the people of a nation have agreed to live under, are by no means so fixed, either in kind or number, as civil rights are. Many of them, like the franchise of elections, or the habeas-corpus, are rather institutional than natural. And even where they seem to be natural, as in the case of speech, petition, and some others, conventional limitations are often put upon them, or at least may be. The right of speech and of the press has indeed two bearings ; it is at once political and civil. As civil it is natural, and cannot well be restrained without oppression ; but towards government, there may be countries where restraint is needful. I say not that it is so, but the thing is possible. And whether, or no, if the people acquiesce in the arrangements of the constitution they must take the consequences, be the measure of political liberty thus secured to them what it may.

Accordingly there are great differences among the nations of the earth in this respect ; much greater than are visible among them in regard to civil freedom. The remark may be novel, but it seems not unimportant.

In all lands (to illustrate by an instance) a guiltless man, who is in his right mind, and not a subject of infectious or contagious disease, is entitled to 'be at large. But suppose him wantonly imprisoned. He turns to government for relief. In England and America, not in vain ; for in each there is a writ to be had for the asking, suited exactly to his wants. The common law has taken care of this, and there are statutes of great energy to make it double-sure. Not so in France. I believe

there is no like provision for the case in any part of Europe. Certainly "the five codes" vouchsafe no habeas-corpus, and no fitting substitute for it. As far as I know, the countries that have borrowed their jurisprudence from the old Roman empire, to the exclusion of a more genial economy of unwritten principles and customs at the people's hands, are all strangers to the unspeakable advantages of that writ. The civil right of being at large is nowhere denied; but the political expedient for a prompt protection of the right, is a boon of Anglo-Saxon liberty, known only where that liberty prevails.

Another instance occurs. A suspected person ought not in reason to be put to the disgrace and danger of a criminal trial, till some means are used to ascertain if possible whether there is real cause for inflicting so severe a calamity upon him. Peradventure he is hunted by a pack of malicious informers. Or perhaps the imputation he is under may be due to some mistake or misconstruction. It is at all events just, that he be proceeded with cautiously, and even tenderly, till guilt appears. And in America, as also in England, this is done. The common law bids him rest in peace till the accusing voice of a grand jury of his fellows is heard above the din of private aspersion. Another capital security on the side of freedom, such as Roman book-law does not afford. Nor has any decent approach to an equivalent been made in all the world, where book-law is in fashion, and popular common law is not; at least none that I am aware of. Republican France allows a single functionary of a department, a sort of district attorney (*procureur*) to put it may be the best of citizens upon trial for their lives. Such is the law of a country whose jurisprudence is regarded by some persons as affording the happiest possible illustration of the advantages of code-law systems over those of an unwritten or customary nature, like the far greater portion of

our own. Indeed, French jurisprudence has been lately recommended to us as a thing to be copied after, and made ours at second hand, in lieu of the old common-law trumpery that we have doted on so long! Till that is done however, the grand-jury feature of our scheme of criminal justice will constitute a remarkable point of difference between the politics of the two countries, and I think, a difference in our favour, as the freer of the two in the relations of the people to their government.

I give one instance more. We have in America the mere nucleus of a standing army. And our highest records tell us, in more or less extent, that it is ever to be so. A doctrine too, which is thoroughly imbedded in the popular mind. The people would deem their liberties insecure, were not that doctrine fundamental to the policy of the country. And they are right. Yet how peculiar are our American views and practice in this respect. England does not agree with us. No European power of any magnitude agrees with us. And the difference is extreme. England indeed, from her insular position, and the jealousy of her common law principles, contains herself admirably, though her domestic armaments are often such as we should look upon with dread. But then she stands at a sort of midway distance between us and the great powers of continental Europe, as regards this point. They have vast hosts on foot continually. Are we too timid then? Are standing armies nothing to the cause of popular freedom? I might as well ask, is the avalanche nothing to the pilgrim in its destined path? That arts and laws go down when arms rise, is an old proverb, and as true as old. The amount of military force kept up in a country in time of peace, will generally be found to indicate the popular condition of that country, with regard to freedom especially, by an inverse ratio.

Now it is from differences of the kind I have endeavoured to illustrate—differences I mean, in points affecting men's relations to government, rather than to each other in society—that we are apt to call one people freer than another. Not that political rights are really the chief elements of freedom; for as I have said before, their rank is secondary, and their office ministerial. Nay it is because they are *not* elementary, and consequently not independent of circumstances (as most civil rights are) that they make the figure they do in national peculiarities; are struggled for and against in national broils; and become at times the only objects thought worth looking at in national existence. Civil rights, in matter of principle, come seldom into question; but rights of a political nature are bones of everlasting contention. And when a victory is gained for the people in this strife, the event is carried very naturally to a political account; without advertg, in the zeal of the moment, to those ulterior effects which it is likely to produce in the improved security and prosperity of their civil rights, and which effects constitute, after all, the true measure of its value. Nor is it wonderful that the interests of private life should be little thought of when states are in convulsions. Such interests are too tame, and too retired withal, to attract much notice on these stormy occasions. The debate is then about a throne overset, about an order of nobility prostrated, about an established church sent packing with a bill of divorce, or other matters of like weight and splendour. When stars are falling, gems, however real and precious, shine in vain.

Let not my meaning be mistaken. Political liberty, subordinate though it be, has yet a value closely proportioned to that of the humbler but more immediately beneficial liberty which it waits upon and guards. For notwithstanding it is possible that men should be well off for a time in their affairs of com-

mon life without adequate safeguards in the constitution, such a state of things is not to be counted on as likely to last. Experience has shown that power, as such, has no trustworthy qualities. There must be strong checks upon it, or days of adversity will surely come. And these checks resolve themselves in many cases into constitutional rights popularly vested for preventing or redressing the wrongs of government itself.

Everybody knows the propensity of public power, in certain circumstances, to the use of general warrants for putting troublesome persons out of the way. The right of habeas-corpus is an effectual check upon this. It works like a charm.

Again, the liberty of the press, or of petition, is the very horror of tyrants. It points "the skinny finger" at government abuses. It drags the man of darkness into day, and arraigns the culprit of official life at the bar of public opinion.

Of course it is political rights, above all others, that ambitious power strives to put down. And power may show a tendency in that direction, without perhaps a consciousness of ambition in the motive. I am sorry to think there is something of the kind evident among a portion of our legislative bodies of late years, in reference to what I deem a political right of the very first magnitude; I mean, the people's right of supremacy in the concoction of their own moral and customary common law; a thing which in all our early history was undisputed in their hands, though by it they set bounds to legislation itself, keeping the great mass of their civil interests in a custody which no mortal, or combination of mortals, then presumed to violate. Such a power, feeling itself thus checked, would naturally chafe a little at the circumstance. And because it found no written constitutional provision on the subject, the conclusion seems to have been at length arrived at,

that the people's prerogative in the matter might be doubted, and the whole province of their ancient jurisdiction overrun without mercy. Whence, if the conclusion shall be generally acted on, a host of evils must result; of which the quackery of codes is not the worst; the gradual but sure ultimate ruin of the judicial system being more deplorable still. The bench has never risen to its proper elevation under any auspices but those of a thoroughly established and unquestioned common law.

It would be a curious inquiry, what political rights in special are most subservient to the cause of civil liberty, and what number and specific detail of them are absolutely necessary to sustain that cause. Much certainly depends upon the virtue and intelligence of the people as to whether they require to be more or less aided in this respect. A wise and moral people might get along with fewer formal checks upon the rampancy of power, than a people of a lower grade of merit would find needful. Allowing however for this difference, there are doubtless some rights of the class under notice that are preeminently necessary in all cases.

Of this description is the great functionary right of the electoral franchise; for it is the only known means of control by which government can be permanently kept faithful to republican principles and objects.

How widely such a franchise ought to be distributed among the population of a country, is a matter by itself. The rule should of course be different in different places. To restrict the electoral body to a very small number, would defeat the purpose of having a predominant popular influence in the system. To embrace all the world in it, were a no less dangerous extreme. Relative adjustment is necessary. The actual state of society must be considered. Something depends on the

amount of patronage entrusted by the constitution to the general electors, and the kind of officers they are to choose. But in every conceivable scheme of free institutions the people, in more or less extent, must have a sovereignty of electoral jurisdiction for appointing the more prominent, and especially the legislative functionaries of political life.

And there are other rights which they cannot want and be free.

Access to the courts, for example. Judicial power is the sole resource in ordinary, compatible with free institutions, for enforcing the laws and maintaining public order. Nor can this effect be fully realized but by setting the halls of justice wide open to everybody.

To us in America, the habeas-corpus seems a right of about the same grade of importance. Lasting freedom without it, is hardly possible.

So also the right of speaking, printing, publishing our sentiments, within the limits of truth, decency, and fair intentions.

In our view, the right of equality under the laws, is of a like essential character. The humblest citizen, juridically speaking, can have no superior in a pure republic.

And finally, if a republic is to last, and be the blessing which the name imports, its liberties must be fed and nourished, one and all of them, by a popularly constituted common law—the most precious perhaps of all the items in the politico-jural catalogue, for it includes the fate of all the rest; ministering on one hand to their occasions through judicature, while on the other it curbs (if properly respected) the licentiousness of legislation, and preserves the just balance of the government.

Do we overrate these things? Long habit has indeed great

influence on men's opinions. The veteran consumer of tea and coffee is apt to take those luxuries for necessities of life. But I apprehend there is no similar illusion in the estimate we put upon the long enjoyed peculiarities of our republican lot. At least it will be time enough to say so when other lands, whose schemes of freedom do not reach our mark, shall have been as free as we are, for as long a time.

Look at French liberty.* But yesterday it was in the bud ; and now its leaves are sere and yellow ; the fruit, such as it was, having already come prematurely to the ground. Monarchical England resembles us incomparably more than France does. Not in all respects to be sure, for France is through and through an agency government. And moreover the people of that country have ostensibly two of our characteristic political rights which England has not ; that is to say, a franchise of election, that goes to the whole government, and a right of equality, that admits of no respect of persons. Nor will I stop now to consider the actual drawbacks of the case in that ill-fated country. I will give her the two rights complete, and say nothing of embarrassments or qualifications.

On the other hand, the people of England, with a popular suffrage, prudently limited, for choosing the most numerous and efficient branch of the legislature, have also the following capital liberties unknown in France : first, the habeas-corpus ; second, the popular common law ; third, a free press ; and fourth, grand juries of accusation ; which last indeed are not in my political octave of enumerated rights, but yet are things of first-rate consequence. Nor need I add that the superiority of the English judicature is of unspeakable value in the same connexion.

* This was written in the latter days of the Napoleon "presidency."

The result of the comparison is obvious. France may have a better-looking government outline by the rules of our republican taste, but England is much the freer country. The former makes organically a fair *show* of freedom, while the latter, with some untoward appearances, enjoys the reality in a wonderful degree. Suppose an Englishman wrongfully arrested; he has his writ of deliverance, and can be promptly set at large. How different in France. An Englishman may be denounced by a score of informers, but it will still remain for a grand jury of his peers to say upon their oaths whether there is cause for putting him to a trial. His judges, if he be tried, are independent, holding by good behaviour; and they are learned, experienced, wise; their tenure of office leads to this. In France how very different. In that strange republic a man is triable on the accusation of a government agent; and he is tried in a fashion as far as possible from the English mode: another style of judges preside; other rules of evidence and procedure govern; and though near half the jury think him innocent (*trial* juries there are, even in France, by the grace of legislation) a majority of one may send him to a modern *bas-tille*, or a gibbet. Upon that political life organ, the press, the queen of England can never lay her hand, though he of the French presidency does it from day to day. Her power in that respect is only what the people's common law of libel confers. Queen though she be, no royal instrument of vengeance graces her hand. But it is otherwise on the republican side of the channel. Presses are seized in France at the very nod of executive power; and this for offences unintelligible to the laws—offences against which the laws have denounced no penalty, no prohibition even—what they call *political* offences. In fine, British justice is mainly executed, and British order kept up, by means of an unwritten system of principles and

customs formed and cherished by the people in their own free thoughts and usages; whereas the French, by their "five codes" of edict law, are tied inextricably to the car, not of Juggernaut indeed, but of the legislative will. And this difference between the two countries is, I take it, the virtual source of near all the rest; having more to do than perhaps any other known cause, with making the so called selfgovernors of the republic less free, as they are undoubtedly by many degrees, than the subjects of the monarchy.

There are those among us, I am well aware, who do not look upon England as at all a nation of freemen. They are persons who in general appear to know little of the interior polity of that kingdom, and they probably derive their opinion of it from certain outward acts of its ruling authorities, such as their ancient oppression of the American colonies, their merciless treatment of the native tribes of India, and their more recent but not less flagitious opium war upon the miserable Chinese. Men are not apt to discriminate very carefully in these matters; and as their notions of civil and political liberty are commonly mixed up together in a blur of utter confusion, so the character they ascribe to a government, as seen from without, is not unfrequently identical in their minds with that of the legal plight and order of society under it. Many persons, who would not willingly misjudge the polity of England, do so, I am satisfied, from a misconception of this kind.

Others there are, and in considerable numbers, whose errors on the subject are exasperated by national bias; partly from historical recollections, partly from the workings of domestic faction, partly from the inbred jealousy of low and vulgar minds, which cannot brook the pride of any government, or indeed the greatness of any country, but our own. Let it pass. Sentiments of foolish antipathy, of blind, unreasoning dislike, as

they prove nothing in regard to the object of their aversion, so they are inaccessible to the force of proof, however cogently it might be brought to bear upon themselves.

Generally speaking, it is not questioned in this country that the English people are free; and we are seldom unjust to the character of their institutions, save perhaps when over zealous as to the merits of our own in comparison. Nor am I disposed to quarrel with the national foible indicated by this saving clause; though assuredly we have no occasion to place American liberty higher on the scale, or English liberty lower, than perfect candour warrants; for we can afford to stand (and ought to make conscience of doing so) by the exact truth.

In the civil concerns of the two nations, there are points of special advantage on either side. English judicature is preeminent. The judges are appointed with more care of selection than with us. And they hold office upon higher terms of personal independence and dignity for the most part. A matter of vast consequence. Would that our statesmen had it more at heart. Other things being equal, liberty is always in direct proportion with these circumstances of judicial independence and dignity. In many of our states the people at large appoint the judges. To my mind, a fearful mistake. And American judges are almost universally ill paid; insomuch that men of high professional standing are seldom willing to go upon the bench. What an absurd parsimony. Such pitiful savings cost the people dear in the end. And when it is added that our judicial officers have often no assurance that they will not be turned adrift in mere caprice at very short distances of time, the climax of our folly on this head appears complete. So that the difference thus far is against us; and unless there be considerable counter items to be entered in our favour from some other score, the account will foot up badly. For I cannot

too often or too fervently repeat the assertion, that liberty depends exceedingly upon judicature, and rises or falls, by a necessity which other things may qualify but cannot overcome, according as that great branch of our administrative interests flourishes or decays, and is in honour or dishonour. The course of public justice is said to be both cheaper and shorter here than in England. How far the youthfulness of the country and the sparseness of its population may account for this, I know not. And whether life, and liberty, and property, are safer or as safe from private injury in the United States, as among the denser settlements of England, is a question I should almost fear to investigate.

Passing however to the *political* side of the subject, I hope we may encounter less embarrassment. And then, if our political freedom shall appear larger and better, on the whole, than British subjects enjoy, it will be competent to argue back from thence to corresponding advantages, real or probable, in our civil condition; provided always that there is no defect of judicature for making our theoretical rights good in practice.

That the English government is not technically of the free class, requires no skill to determine. But let not the importance of the fact be overestimated. Appearances do not always tell the whole truth. Civil liberty, we know, may be vastly greater than its political accompaniments would lead us to suppose. Nor is the *political* liberty of Britons so inferior to ours as some national zealots pretend. The great majority of our rights, as between us and the state, are of one stamp with those an Englishman possesses in the same relation. Whoever doubts it, will do well to try the matter by a reference to particulars.

The British parliament indeed makes laws of banishment for crime. But aside from this (and really it is not much to

honest men's liberty) an Englishman is as safe in his right of home residence as an American is. And while at home, his freedom of access to courts and magistrates is as great as ours —perhaps a little greater in the matter of exemption from having to give security for the use he makes of it. So also if accused injuriously, a grand jury is as likely to save him the expense and shame of a public trial, as though he were a citizen of this country and pursued by calumny here. And should the further wrong of an arrest assail him, his habeas-corpus is as ready to his hand, and as effectual for his relief, in London or Liverpool, as if he were one of ourselves, and sued his process of deliverance in New York or Boston. A Briton keeps arms in his house just as we do. He speaks, writes, publishes, as freely; is as free to meet his fellows in council, and to join them in petitioning frankly, unreservedly, for the correction of abuses. What is better still, he breathes a common law atmosphere, and inhales with it qualities of mental character that make him a freeman insensibly, whether he will or no, by a sort of natural growth. He is thus bred to freedom. His earliest thoughts, his very beginnings of intellectual and moral life imbibe its elements, and become ennobled with its spirit.

Here then are seven of the eight enumerated liberty rights of our own polity, in the relation of government and people, the same, with scarce a point of difference, in England as in America; while the state of things in the civil department, so far as judicature is evidence (and it goes a great way) seems not inferior to ours, but possibly a little superior. And is not England free?

If America be freer, God be praised. And that she is so I am thankful to believe. Whether she can maintain her advantage permanently is another matter. We must look to that. It

is the great question of the age. I think however that our present relative superiority of plight upon the whole may be readily shown.

1. We have a government more entirely popular in its structure and principles than that of Great Britain; being of an agency character throughout, and having its whole organization based, more or less immediately, on the general voice of the country, with elections so frequent as to keep the trusts of power ever in mind. In which respect we differ very pointedly from English subjects, who are only consulted once in seven years upon the composition of the house of commons, and upon that of the other departments of authority, never. This difference necessarily affects the working of the political system, as well as its self-sustaining quality and virtue.

2. Our rights as citizens, in reference to government, are the same as those of the people of England with regard to the several particulars, of remaining under the canopy of the laws, keeping and bearing arms, the habeas-corpus, access to courts and magistrates, speech and the press, petition, the common law, and others that have not been named. A few slight qualifications distinguish the conditions of the two countries on one or two of these points, but in general their case is so far identical.

3. Unlike the English people, those of America are *all equal* in their jural circumstances. We have no hereditary royalties or notabilities, no state church, no legally recognised prelacy, no privileged orders of any sort. This is a vast difference. Hereditary superiors imply hereditary underlings. One enormity begets the other. And no man is satisfactorily free, when there are those around him in whose presence he is doomed by rules of caste to hang his head. It hurts his self-

respect ; it damps his enterprise ; it enfeebles his motives of exertion.

4. Unlike the people of England, those of America have a government *constitutionally limited in its war powers*. This is not strictly a liberty, but it is a prodigious safeguard of freedom in every form. What dangers the liberties of other lands are subject to, from having the public peace at the mercy of *sovereign individuals*, and liable to be sacrificed at any time for reasons of personal pique or desire, I need not say. Nor is it necessary to detail the evils of an engrossing war-policy on the part of rulers—conscriptions, standing armies, a quartered soldiery, with military license often rampant over civil authority, and every one's plans and hopes of the future embarrassed with apprehension. The picture is continental rather than English, but it is English too, in a degree that would be ill endured in this country.

5. I mention one thing more. Our constitutional records and the whole tissue of our state papers teach us, that our government is limited in another branch of power, under which England and English liberty have suffered greatly : it is *the taxing power*. Frugality is as truly characteristic of our politics as it is said to be of at least a portion of our people. The salaries annexed to public employments are all fixed at low rates. Take the highest office in the country for example. There are single bishops in England, whose state our president has not the means of beginning to emulate. And we are satisfied with our republican style of things in this respect. It is as thoroughly established in the law of public opinion as in that of our institutions. Taxation was the critical topic of our first quarrel with the mother country. Our people settled the point then that they would pay no taxes but of their own

imposing. And the reason was, they wished to have a check upon the action of government in the matter of supplies and expenditures. One object of limiting the war power was, to save needless expense. We claim to have our business done cheaply by government agents. With regard to the bench, our conduct has been most unwisely penurious in most of the states. We have not discriminated duly between the claims of different offices. Everywhere frugality is the rule.

Need I explain how liberty is concerned in all this? May not a man be taxed to an extreme that will make a slave of him? Taxes are often laid upon liberty itself as a direct charge; and when property is the subject of the charge, the burden falls indirectly upon liberty, as the means of acquisition by which property is gained. To embarrass the employment of this means of acquisition, is to oppress. And would the oppression be less obvious or less grievous if, instead of preventing men from becoming rich by the use of their liberty, the law allowed them just to reap the harvest of their industry, and then despoiled them of it? Either way their exertions are disappointed, their hopes crushed. A southern negro is allowed to labour, but the very curse of his condition lies in a great measure in the habitual seizure of the fruits of his toil by other hands than his own. It is this that makes him the slave of his master. Might not a citizen be made a government slave by the same process? And just so far as he is taxed unduly, that consequence follows. He is thus far hindered from accomplishing his aims. He tries to lay up something for his family or others, but his efforts are frustrated. In a word, his liberty fails him.

I reproach not England. It were like reproaching our southern planters for an unhappy feature of their case, which has descended upon them from past ages, and of which it is

doubtful how they are to be relieved without some peril. No, I reproach not England with regard to her pecuniary burdens; she deserves commiseration rather; more especially when it is considered that these burdens press upon a style of popular freedom which, in most other points of view, is still the glory of her institutions and her character. But for her public debt; but for the mountain weight of her civil list; but for the perplexity of her European relations, and a consequent foreign policy that at times consumes her vitals; but for the war-and-peace option lodged in one frail breast by constitutional prerogative; but for her feudal pyramid of ranks and dignities, that bears her people down, the common mass, somewhat too near the earth; but for her enormous annual waste (such it appears to us) of the hard earnings of her subjects;—oh, but for these things, what a land of wonders, of miracles, were England!

Nay, what a land is England even now, “with all her faults!”—the more miraculous for stemming as she does the tides of her difficulties; free in spite of them; looking ever *per aspera ad sidera* with unblenching eyes, and doing more than any other nation ever did to scale the heaven of her aspirations. Verily, if we are freer than England, it is a distinction worth a struggle to maintain.

NOTE A., REFERRED TO AT PAGE 123.

CICERO, in the third book of his Offices, propounds for consideration the following case of conscience.

“Si vir bonus Alexandriâ Rhodum magnum frumenti numerum advexerit, in Rhodiorum inopiâ et fame, summâque annonæ caritate: si idem sciat, complures mercatores Alexandriâ solvisse, navesque in cursu, frumento onustas, petentes Rhodum viderit: dicturusne sit id Rhodiis, an silentio suum quam plurimo venditurus?”

And he gives both sides of the question in a supposed discussion of it between two philosophers.

“In hujusmodi causis aliud Diogeni Babylonio videri solet, magno et gravi stoico, aliud Antipatro, discipulo ejus, homini acutissimo. Antipatro omnia patefacienda, ut ne quid omnino, quod venditor nōrit, emptor ignoret; Diogeni venditorem, quatenus jure civili constitutum sit, dicere vitia oportere, cetera sine insidiis agere, et quoniam vendat, velle quàm optime vendere.”

The discussion is too long to be copied; and it will be more interesting to proceed to the great Rōman's judgment as between the two philosophers.

“Non igitur videtur frumentarius ille Rhodios celare debuisse. Neque enim id est celare, quidquid reticeas: *sed cum quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire.* Hoc autem celandi genus quale sit, et cujus hominis, quis non videt? certè non aperti, non simplicis, non ingenui, non justus, non viri boni: versuti potius, obscuro, astuti, fallacis, malitiosi, callidi, veteratoria, vafri: hæc tot, et alia plura, nonne utile est vitiorum subire nomina?” &c. &c. &c.

There have been various annotations on this case and judgment of Cicero, from St. Thomas downwards, but without approaching to a settlement of the question. I content myself with giving the views of Pothier, perhaps the best of the commentators, as far as can be done in a few brief extracts from his "*TRAITÉ DU CONTRAT DE VENTE*," ch. ii., art. 3.

He says most writers upon natural law have come to a conclusion different from that of the Roman orator on the subject.

"Ces auteurs pensent que la bonne foi que doit régner dans le contrat de vente, n'oblige le vendeur à autre chose qu'à faire connoître à l'acheteur la chose qu'il lui vend pour ce qu'elle est, sans lui rien dissimuler de ses défauts, et à ne la pas vendre au-delà du prix qu'elle a lors du contrat; qu'il ne commet aucune injustice en la vendant à ce prix, quoiqu'il sache que ce prix doit de beaucoup diminuer par la suite; qu'il n'est pas obligé de faire part à l'acheteur de la connoissance qu'il a des circonstances qui doivent causer cette diminution; l'acheteur n'ayant pas plus de droit d'exiger qu'il lui fasse part de cette connoissance, que d'exiger qu'il lui fasse part de son bien. S'il la lui faisoit, ce seroit un acte gratuit de bénéfice, qu'il n'est obligé d'exercer qu'envers ceux qui sont dans le besoin. Les Rhodiens n'étoient pas dans ce cas: ils ne manquoient que de blé, et ils avoient de l'argent pour acheter celui qui ce marchand leur vendoit. Le profit qu'il fait en vendant son blé au prix qu'il vaut aujourd'hui, quoiqu'il sache qu'il vaudra beaucoup moins dans peu, n'a rien d'injuste; c'est une juste récompense de la diligence qu'il a faite pour arriver le premier, et du risque qu'il a couru de perdre sa marchandise, si quelque accident, auquel il étoit exposé, l'eût empêché d'arriver à temps. Il n'est pas plus défendu de vendre au prix courant une marchandise, sans avertir des circonstances qui la doivent faire diminuer, que de l'acheter au prix courant sans avertir des circonstances qui la doivent faire augmenter."

Pothier could not agree with these writers.

"Nonobstant ces raisons et ces autorités," he observes, "j'aurois de la peine à excuser d'injustice le profit que retireroit un vendeur de la reticence de quelque fait qui doit causer une diminution dans le prix,

lorsque cette diminution doit être très considérable, et qu'elle doit certainement arriver au bout d'un très court intervalle de temps, telle que seroit la connoissance que ce marchand auroit eue qu'il y avoit une flotte chargée de blé prête à entrer dans peu de jours dans le port de Rhodes, ce qui devoit certainement causer une diminution considérable sur le prix du blé. Dans le contrat de vente, de même que dans tous les contrats commutatifs, l'équité veut que ce qui chacune des parties donne soit l'équivalent de ce qu'il reçoit, et que l'une des parties ne veuille pas profiter aux dépens de l'autre. Or, dans l'espèce de ce marchand, qui, en dissimulant la connoissance qu'il a de ce fait, vend son blé pour le prix de 100 liv. le muid, qui est aujourd'hui le prix courant, ce marchand peut-il, sans se faire illusion, se persuader que ce blé, qu'il sait ne devoir valoir dans deux jours que 20 liv., soit l'équivalent de 100 liv. qu'il reçoit?" &c., &c.

I quote no further, because no additional argument is attempted in what follows. The expressions that are here put in italics, seem to suggest all the grounds this very eminent jurist was aware of for depriving the Rhodian merchant of his *caveat emptor* rule of trade. That these grounds are insufficient for the purpose, is very plain. The main one, namely, that the equity of trade involves the doctrine of *equivalents*, is palpable error, and can warrant no deduction whatever. The others have not even the semblance of principles, but are mere circumstances of aggravation as to the *amount of the fall* that is likely to take place in the market, and the *shortness of the time* that is to bring it to pass.

The result is, that Pothier gives us no satisfaction.

Let us see if Cicero has been more successful. I have placed the whole of his argument also in italics. His principle is (his major premiss I might call it) that it is dishonest for a trader to desire, for selfish reasons, that the man he deals with should be ignorant of facts known to himself. A principle again that leads to nothing; not as being false, but wide of the mark; for it has no application to the actual business of merchandizing. And if it did apply, it would defeat itself, for it would annihilate the very motive of trade; taking away all liberty of buying cheap or selling dear by design.

Upon the whole, I adhere to the doctrine of my own text, with a

contentment all the more complete, because the writings of these celebrated authors give me none that I like as well. To my mind, the Rhodian case is unembarrassed. The approach of supplies from Alexandria was a private fact, entirely foreign to the basis in common between the dealing parties—that is, to the unexpressed implications of their mutual traffic; and the seller was consequently under no obligation of good faith to say a word upon the subject; any more than the buyers would have been to inform him of the extremity of the local famine, had he in fact been ignorant of the existence of that reason for demanding high prices.

THE END.

ERRATA.

Page 21, line 3 from bottom, for *when* read *where*.

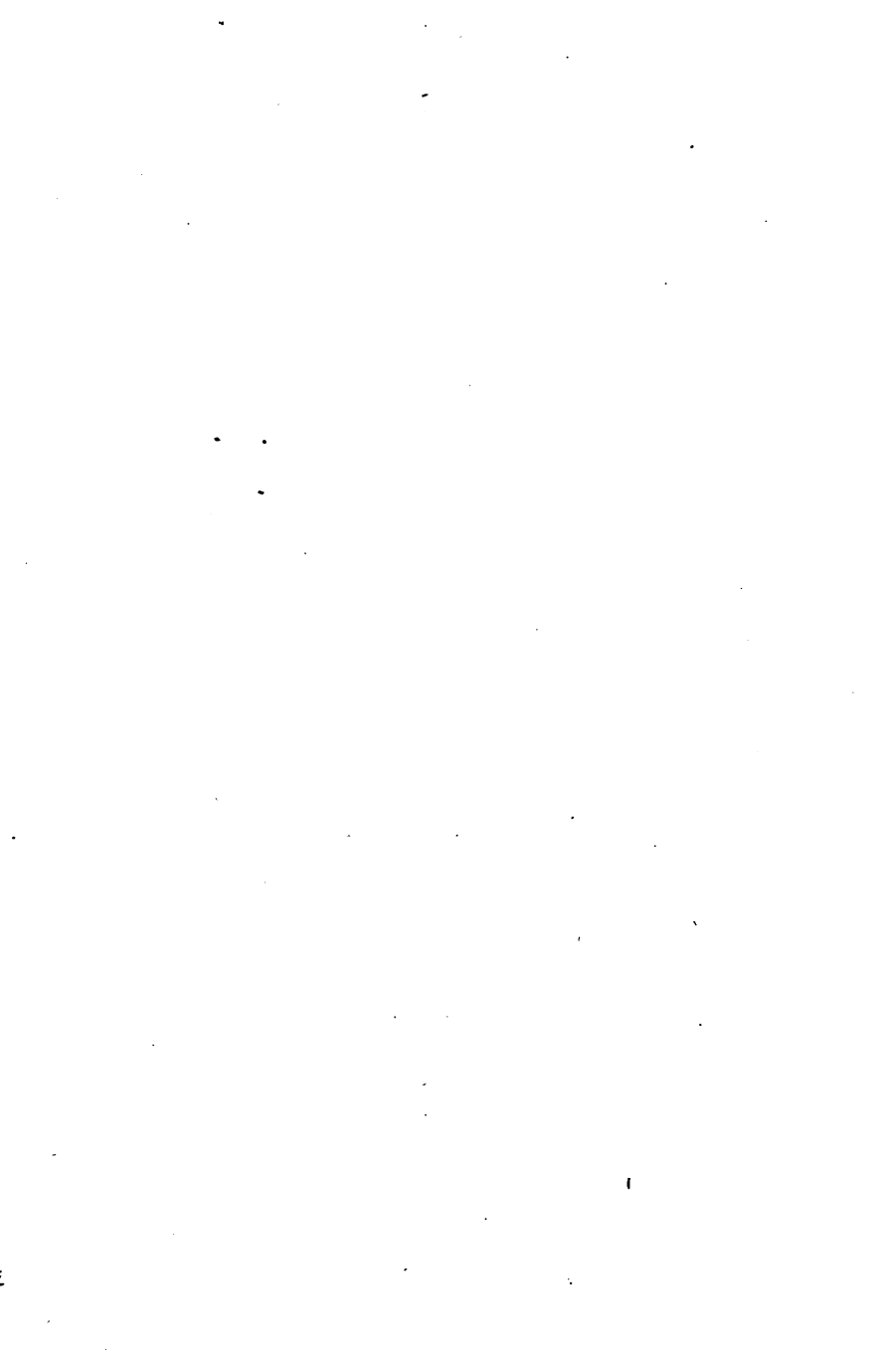
" 70, " 11 " top, " *vice* " *vices*.

" 91, " 15 " " " *now onder* read *no wonder*; and for
have had. " *have*.

" 146, " 14 " bottom, " *clauses* " *clause*.







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